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REPORTS OF CASES
DECIDED IN THE
APPELLATE COURTS
OF THE
STATE OF ILLINOIS

AT THE MARCH TERM, 1897, OF THE FIRST DISTRICT; THE MAY AND
DECEMBER TERMS, 1896, OF THE SECOND DISTRICT, AND
THE FEBRUARY TERM, 1897, OF THE
FOURTH DISTRICT.

VOL. LXX

REPORTED BY
MARTIN L. NEWELL
COUNSELOR AT LAW

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THE APPELLATE COURTS OF ILLINOIS

These Courts are held by Judges of the Circuit Courts assigned by the Supreme Court for a term of three years. One Clerk is elected in each district.

MARTIN L. NEWELL, Reporter, Springfield, Illinois.

FIRST DISTRICT.

Composed of the county of Cook.
Court sits at Chicago on the first Tuesdays of March and October.
CLERK—Thomas N. Jamieson, Ashland Block, Chicago.

JUSTICES.

FRANCIS ADAMS, Ashland Block, Chicago, Illinois.
NATHANIEL C. SEARS, “ “ “ “
THOMAS G. WINDES, “ “ “ “

SECOND DISTRICT.

Composed of the Northern Grand Division of the Supreme Court, except Cook county.
Court sits at Ottawa, LaSalle county, on the third Tuesday in May, and the first Tuesday in December.
CLERK—Columbus C. Duffy, Ottawa, Illinois.

JUSTICES.

JOHN D. CRABTREE, Dixon, Illinois.
DORRANCE DIBELL, Joliet, “
FRANCIS M. WRIGHT, Urbana, “

THIRD DISTRICT.

Composed of the Central Grand Division of the Supreme Court.
Court sits at Springfield, Sangamon county, on the third Tuesdays in May and November.
CLERK—W. C. Hippard, Springfield, Illinois.

JUSTICES.

OLIVER A. HARKER, Carbondale, Illinois.
BENJAMIN R. BURROUGHS, Edwardsville, Illinois.
JOHN J. GLENN, Monmouth, Illinois.

FOURTH DISTRICT.

Composed of the Southern Grand Division of the Supreme Court.
Court sits at Mount Vernon, Jefferson county, on the fourth Tuesdays in February and August.
CLERK—Frank W. Havill, Mount Vernon, Illinois.

JUSTICES.

JAMES A. CREIGHTON, Springfield, Illinois.
NICHOLAS E. WORTHINGTON, Peoria, “
HIRAM BIGELOW, Galva, “

CIRCUIT COURTS.

Exclusive of Cook county, the State of Illinois is divided into Seventeen Judicial Circuits, as follows:

First Circuit.—The counties of Alexander, Pulaski, Massac, Pope, Johnson, Union, Jackson, Williamson and Saline.

JUDGES.

JOSEPH P. ROBERTS, Cairo, Illinois.
OLIVER A. HARKER, Carbondale, "
ALONZO K. VICKERS, Vienna, "

Second Circuit.—The counties of Hardin, Gallatin, White, Hamilton, Franklin, Wabash, Edwards, Wayne, Jefferson, Richland, Lawrence and Crawford.

JUDGES.

EDMUND D. YOUNGBLOOD, Mount Vernon, Illinois.
PRINCE A. PEARCE, Carmi, "
ENOCH E. NEWLIN, Robinson, "

Third Circuit.—The counties of Randolph, Monroe, St. Clair, Madison, Bond, Washington and Perry.

JUDGES.

BENJAMIN R. BURROUGHS, Edwardsville, Illinois.
MARTIN W. SCHAEFFER, Belleville, "
WILLIAM HARTZELL, Chester, "

Fourth Circuit.—The counties of Clinton, Marion, Clay, Fayette, Effingham, Jasper, Montgomery, Shelby and Christian.

JUDGES.

WILLIAM M. FARMER, Vandalia, Illinois.
TRUMAN E. AMES, Shelbyville, "
SAMUEL L. DWIGHT, Centralia, "

Fifth Circuit.—The counties of Vermilion, Edgar, Clark, Cumberland and Coles.

JUDGES.

HENRY VAN SELLAR, Paris, Illinois.
FERDINAND BOOKWALTER, Danville, "
FRANK K. DUNN, Charleston, "

Sixth Circuit.—The counties of Champaign, Douglas, Moultrie, Macon, DeWitt and Piatt.

JUDGES.

FRANCIS M. WRIGHT, Urbana, Illinois.
EDWARD P. VAIL, Decatur, "
WILLIAM G. COCHRAN, Sullivan, "

Seventh Circuit.—The counties of Sangamon, Macoupin, Morgan, Scott, Green and Jersey.

JUDGES.

JAMES A. CREIGHTON, Springfield, Illinois.
ROBERT B. SHIRLEY, Carlinville, "
OWEN P. THOMPSON, Jacksonville, "

Eighth Circuit.—The counties of Adams, Schuyler, Mason, Cass, Brown, Pike, Calhoun and Menard.

JUDGES.

JOHN C. BROADY, Quincy, Illinois.
HARRY HIGBEE, Pittsfield, "
THOMAS N. MEHAN, Mason City, "

Ninth Circuit.—The counties of Knox, Warren, Henderson, Hancock, McDonough and Fulton.

JUDGES.

JOHN J. GLENN, Monmouth, Illinois.
GEORGE W. THOMPSON, Galesburg, "
JOHN A. GRAY, Canton, "

Tenth Circuit.—The counties of Peoria, Marshall, Putnam, Stark and Tazewell.

JUDGES.

LESLIE D. PUTERBAUGH, Peoria, Illinois.
THOMAS M. SHAW, Lacon, "
NICHOLAS E. WORTHINGTON, Peoria, "

Eleventh Circuit.—The counties of McLean, Livingston, Logan, Ford and Woodford.

JUDGES.

COLOSTIN D. MYERS, Bloomington, Illinois.
GEORGE W. PATTON, Pontiac, "
JOHN H. MOFFETT, Paxton, "

Twelfth Circuit.—The counties of Will, Kankakee and Iroquois.

JUDGES.

DORRANCE DIBELL, Joliet, Illinois.
ROBERT W. HILSCHER, Watseka, "
JOHN SMALL, Kankakee, "

Thirteenth Circuit.—The counties of Bureau, LaSalle and Grundy.

JUDGES.

CHARLES BLANCHARD, Ottawa, Illinois.
HARVEY M. TRIMBLE, Princeton, "
SAMUEL C. STOUGH, Morris, "

Fourteenth Circuit.—The counties of Rock Island, Mercer, Whiteside and Henry.

JUDGES.

HIRAM BIGELOW, Galva, Illinois.
WILLIAM H. GEST, Rock Island, Illinois.
FRANK D. RAMSEY, Morrison, "

Fifteenth Circuit.—The counties of Jo Daviess, Stephenson, Carroll, Ogle and Lee.

JUDGES.

JOHN D. CRABTREE, Dixon, Illinois.
JAMES SHAW, Mount Carroll, "
JAMES S. BAUME, Galena, "

Sixteenth Circuit.—The counties of Kane, DuPage, DeKalb and Kendall.

JUDGES.

HENRY B. WILLIS, Elgin, Illinois.
CHARLES A. BISHOP, Sycamore, Illinois.
GEORGE W. BROWN, Wheaton, "

Seventeenth Circuit.—The counties of Winnebago, Boone, McHenry and Lake.

JUDGES.

JOHN C. GARVER, Rockford, Illinois.
CHARLES E. FULLER, Belvidere, Illinois.
CHARLES H. DONNELLY, Woodstock, Illinois.

COURTS OF COOK COUNTY.

The State constitution recognizes Cook county as one judicial circuit, and establishes the Circuit and Superior Courts of said county. The Criminal Court of Cook County is also established with jurisdiction of a Circuit Court in criminal cases only. The judges of the Circuit and Superior Courts are judges, *ex-officio*, of the Criminal Court.

CIRCUIT COURT.

CLERK—John A. Cook, County Building, Chicago.

JUDGES.

EDWARD F. DUNNE,
MURRAY F. TULEY,
RICHARD S. TUTHILL,
FRANCIS ADAMS,
ARBA N. WATERMAN,
ELBRIDGE HANEY,
OLIVER H. HORTON,

JOHN GIBBONS,
RICHARD W. CLIFFORD,
THOMAS G. WINDES,
EDMUND W. BURKE,
CHARLES G. NEELY,
FRANK BAKER,
ABNER SMITH.

SUPERIOR COURT.

CLERK—Stephen D. Griffin, County Building, Chicago.

JUDGES.

HENRY M. SHEPARD,
THEODORE BRENTANO,
PHILIP STEIN,
WILLIAM G. EWING,
JONAS HUTCHINSON,
JAMES GOGGIN,

ARTHUR H. CHETLAIN,
HENRY V. FREEMAN,
JOHN BAETON PAYNE,
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FARLIN Q. BALL,
JOSEPH E. GARY.

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CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

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170s 434.

FIRST DISTRICT—MARCH TERM, 1897.

John B. Mallers v. Whittier Machine Company.

1. *LIS PENDENS*—*Former Suit Dismissed Without Paying Costs.*—There is no rule of law requiring a former suit to be considered as pending after it has been dismissed until the defendant's costs have been paid, or compelling a plaintiff to pay the costs of a first action before he is suffered to proceed with a second upon the same ground.

Assumpsit, on two promissory notes.—Appeal from the Superior Court of Cook County: the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

CHAS. B. STAFFORD, attorney for appellant, contended that for the purposes of a plea of *lis pendens* a suit should be considered pending in cases of non-suit until the plaintiff had made good defendant's costs. *White v. Smith*, 4 Hill (N. Y.) 166; *S. C.*, 7 Hill, 520.

HAWLEY & PROUTY, attorneys for appellee.

Upon the dismissal of a suit for want of jurisdiction, it is proper for the court to give judgment for costs against the defendant. *LeMoyne v. Harding*, 132 Ill. 78; *Bangs v. Brown*, 110 Ill. 96.

Such a judgment is final and disposes of the case, but it does not bar another suit for the same causes of action in another court of competent jurisdiction. 1 Freeman on Judgments (4th Ed.), Sec. 17.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment of \$7,204, recovered against appellant in an action of assumpsit brought by appellee as endorsee of two promissory notes for \$3,000 each, made by appellant.

To the action, the appellant filed his verified plea of a former suit pending between the same parties, for the same causes of action, in the Circuit Court of the United States for the Northern District of Illinois, Northern Division, which plea concluded by praying judgment of the writ and that the same might be quashed, and was therefore a plea in abatement of the suit. No other plea was interposed.

Appellant, in his brief, states the issue, as follows:

"The issue raised in this case is whether or not a plaintiff who suffers an enforced non-suit can, without reimbursing the defendant for court costs expended, compel the defendant to again contest upon the self-same claim in regard to which the non-suit was rendered. The facts in this case, as shown by the abstract, are, in brief, these: Plaintiff company sued the defendant upon two promissory notes in the United States Circuit Court, Northern District of Illinois, Northern Division. Defendant appeared and regularly pleaded a number of defenses. At the time of the trial, the suit was dismissed on motion of defendant for want of jurisdiction, and defendant's costs to the amount of \$13.11 were taxed against the plaintiff; plaintiff has never paid these costs. And utterly indifferent to the expense incurred by the defendant without reimbursement, plaintiff instituted suit in the Superior Court of Cook County, upon the self-same issues involved in the previous suit. The parties are the same and the subject-matter of the suit is the same.

The plaintiff is a corporation non-resident in Illinois, and without any property or business representative, so far as is ascertainable."

Appellant concedes that no Illinois authority in support of his contention can be found, but relies on the reason and justice of his proposition, and upon *White v. Smith*, 4 Hill, 166, and the opinion of Senator Lott in the same case, 7 Hill, 520.

An examination of the New York cases referred to, and some others, indicates the prevalence in that State at one time of a practice concerning voluntary discontinuances of suits, and the effect thereof, never known in this State, and not elsewhere pursued so far as we know, and we will not stop to point out the inapplicability of those decisions to this case.

We have been able to find no authority to sustain appellant's position, that a former suit remains pending after it has been dismissed until the defendant's costs have been paid.

In *Tidd's Practice*, p. 538, some instances are given in which a stay of proceedings in a subsequent suit will be granted until the costs of a prior one are paid, but it is there said that there is "no general rule by which a plaintiff is compelled to pay the costs of a first action before he is suffered to proceed with the second," and it is not mentioned as ever having been held that a plea in abatement would be good to a second action, either in the same or in any other court, because of the costs in the first action remaining unpaid.

There may be such a semblance of justice in appellant's position as would prompt the legislature to provide for such cases, but courts are not at liberty to make laws. No other claimed error is argued.

The judgment of the Superior Court will be affirmed. This disposition of the case renders it unnecessary to mention appellee's motion to strike out the bill of exceptions.

Appellee asks for damages under the statute permitting such in case an appeal be prosecuted for delay merely, but we do not feel that in this case damages should be awarded.

70 — 20
115 *118

**Victor Falkenau and Louis Falkenau v. Mary Rowland,
Administratrix, etc.**

1. **DAMAGES**—*In Case of Death by Negligence—When only Nominal.*—Only nominal damages can be recovered for the death of a brother, where there is no evidence that at the time of his death either of his brothers or sisters had any pecuniary interest in his life.

2. **SAME**—*Death from Negligence.*—In an action for damages resulting from the death of a kinsman by the negligence of the defendant, the actual pecuniary loss is the sole measure of the recovery, and there is no warrant for giving more than the total loss, in order that one entitled to share may get enough.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed if remittitur be entered, otherwise reversed and remanded. Opinion filed April 15, 1897.

EDWARD S. CURTIS and WM. M. JOHNSON, attorneys for appellants, contended that in suits by the next of kin for causing the death of a relative, the pecuniary loss is the sole ground of recovery, the satisfaction of that loss the sole object to be attained by a judgment and this is to be ascertained from the evidence. L. S. & M. S. R. R. Co. v. Sunderland, 2 Brad. 307; Andrews v. Bodecker, 17 Brad. 213; C. E. & L. S. Ry. Co. v. Adamick, 33 Ill. App. 412; C., M. & St. P. Ry. Co. v. Wilson, 35 Ill. App. 346; Armour et al. v. Czischki, 59 Ill. App. 17; City v. Major, 18 Ill. 360; Chicago & R. I. R. R. Co. v. Morris, 26 Ill. 403; Chicago & Alton R. R. Co. v. Shannon, 43 Ill. 346; Chi. & N. W. v. Swett, 45 Ill. 204-5; Conant v. Griffin, 48 Ill. 412; I. C. R. R. Co. v. Welden, 52 Ill. 295; I. C. R. R. Co. v. Baches, 55 Ill. 388; City of Chicago v. Scholten, 75 Ill. 471; Quincy Coal Co. v. Hood, 77 Ill. 71; C., B. & Q. R. R. Co. v. Harwood, 80 Ill. 88; C. & N. W. R. R. Co. v. Moranda, 93 Ill. 304; Holton v. Daly, 106 Ill. 138; N. C. S. R. R. Co. v. Brodie, 156 Ill. 320.

WING, CHADBOURNE & LEACH, attorneys for appellee.

Falkenau v. Rowland.

A jury may assess such damages as will be a just and fair compensation for the pecuniary loss suffered by the next of kin from the death of a deceased person killed through the negligence of a defendant, and in doing so, they may take into consideration every reasonable expectation the survivors may have had of pecuniary benefit or advantage from the continuance of his life. *Andrews v. Boedecker*, 17 Ill. App. 218.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued as administratrix of Thomas Morrison, the man killed in the accident which was the subject of investigation in *Falkenau v. Abrahamson*, 66 Ill. App. 352, as is there mentioned.

We will not go over the facts. The deceased left a mother in Ireland, who was in the neighborhood of sixty years of age, and five brothers and sisters, part of them there, the others here.

There is no evidence that at the time of his death either of the brothers or sisters had any pecuniary interest in his life, though at times theretofore some of them had received from him pecuniary aid. Had there been no mother living only nominal damages would have been permissible. *North Chicago St. R. R. v. Brodie*, 156 Ill. 317.

The evidence must be read with liberal construction in her favor to warrant the conclusion that his continuance in life was—in money, and to that only does the statute extend—of value to her to the amount of \$50 per annum. The judgment is for \$5,000.

Now we have this problem: The statute requires the damages to be distributed as if there had been money left by the deceased dying intestate. Five-sevenths of the damages must go to persons who have no right to anything. In order that the one meritorious recipient of damages, by the two-sevenths which the law will give her, may get her real and actual damages, others not entitled to anything must be given two dollars and a half for each dollar that she gets. Any such construction of the statute leads to absurd

consequences, because it does not provide that the damages shall be confined to compensating those who lose by the death, as does the original English statute and the statutes of many of the States. 2 Thomp. Negl. 1275, *et seq.*

There is no warrant in the statute for giving more than the total loss in order that one entitled to share may get enough.

We will adopt *Armour v. Czischki*, 59 Ill. App. 17, as a precedent for this case. If the appellee within ten days remit the excess over \$1,500, we will affirm the judgment for that sum only, reversing it as to the excess. Otherwise reverse the judgment and remand the cause; in either event at the cost of the appellee.

70	22
172	63
70	22
77	111
70	22
80	170

People's Casualty Claim Adjustment Co. v. C. S. Darrow.

1. PLEADING—*Legal Services Covered by the Common Counts.*—Where the abstract states that the declaration had in it the common count "for the price and value of work, and material for the same provided," this court will assume, in the absence of any more specific statement, that the declaration was sufficient as a pleading to authorize the recovery of money due for services as a lawyer.

2. CONTRACTS—*Where the Minds of the Parties did not Meet as to Price of Services, their Value may be Proved.*—Where the evidence shows such a misunderstanding between the parties to a contract, as to the price to be paid for services, that the jury may properly find that the minds of the parties never met upon the question of price, evidence of the value of the services is admissible.

3. PRACTICE—*When Objections to Testimony Must be Specific.*—When the ground of an objection is of such a character that the objection may be obviated, such ground must be stated specifically, and in time to afford opportunity to obviate it, otherwise the objection will not be considered on appeal.

4. VERDICTS—*When Not Part of the Record.*—A verdict which jurors are alleged to have written and handed in is not part of the record unless embraced in the bill of exceptions.

5. TRIALS—*Restriction of Arguments.*—The fact that counsel for appellant was only allowed seven minutes to argue this case before the jury, held not to be an unreasonable restriction.

6. EVIDENCE—*Proof of Value of Services to Corroborate Statement as*

People's Claim Adjustment Co. v. Darrow.

to Contract Price Thereof.—Where there is a conflict of testimony as to the amount agreed to be paid for certain services, the value of such services may be shown, and may be considered by the jury in determining the credibility of the testimony.

Assumpsit, for attorney's fees. Appeal from the Circuit Court of Cook county; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

F. W. BECKER, attorney for appellant.

WILLIAM C. SNOW, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The appellee sued the appellant to recover for services as an attorney.

That the services were rendered at the request of the appellant, and were satisfactory, was undisputed.

The abstract states that the declaration had in it the common count "for the price and value of work and material for the same provided," which we assume, in the absence of any more specific statement, was sufficient as a pleading upon which to recover money due for services as a lawyer. *Neagle v. Herbert*, 64 Ill. App. 619.

The president of the appellant and the appellee both testified that the services were rendered under an express contract, but differed as to its terms; the effect of which testimony, if both testified honestly, and neither had forgotten, was to prove that there was no express contract because the parties did not understand each other. Then evidence of the reasonable compensation to the appellee was in order. *Kirk v. Wolf Mfg. Co.*, 118 Ill. 567.

Hypothetical questions were put to other lawyers as to the value of the services of the appellee, embracing one item of service which he had not rendered; but the objection of the appellant to such questions was specifically upon another ground, with the vague general statement that the question was "based upon an assumption of facts that have not been shown to exist." This is too general.

Had the objectionable item been pointed out it would doubtless have been dropped out of the question. But vague and general as was the objection in that particular, it is clear that the objector did not have that item in mind, for in repeating his objection on the examination of the second lawyer he confined it to the other ground. It is too late now to object. *Schroeder v. Walsh*, 10 Ill. App. 36.

There is a technical fault in one instruction in omitting, as a condition of the liability of the appellant, that the services were rendered at its request, but as this was a fact both sides proved, the omission was without harm.

Another instruction is wholly wrong, but did no harm. It is as follows :

"The jury are instructed that if the evidence regarding the contract is so conflicting or uncertain that they are unable to arrive at the exact terms of the contract between the plaintiff and defendant, then they are entitled to consider the value of the services of the plaintiff, as shown by the witnesses in this case, and to use this testimony as bearing upon the reasonableness of the statements of the plaintiff and defendant, for the purpose of arriving at the true contract between the plaintiff and defendant."

If the jury could not "arrive at the exact terms of the contract" how could they arrive at the "true contract?"

The instruction means nothing, and could not have misled. If it was intended and understood as saying that in the conflict of testimony, the value might be considered in determining the credibility of the testimony, it is common sense, and not shown not to be law. *Carter v. Carter*, 37 Ill. App. 219; 152 Ill. 434.

An objection now made, based upon the verdict which the jurors are supposed to have written and handed in, is not before us. That paper is no part of the record—not being in the bill of exceptions. *Lambert v. Borden*, 10 Ill. App. 648.

What the jury wrote was supererogatory. Sec. 57, Ch. 110, R. S., Practice.

There remains the objection that before the argument

Scott v. Schnadt.

began the court announced that counsel on each side would be limited to seven minutes for argument, and stopped the counsel of appellant at the end of that time. By exception, as well as by the motion for a new trial, the question is before us whether that was reasonable.

I think not, but am in the minority. It is a great embarrassment to the ordinary lawyer to be warned beforehand that he must be so brief, and the time fixed is really not sufficient to make any argument.

There is great difficulty in applying the rule of *Foster v. Magill*, 119 Ill. 75.

The judgment is affirmed.

Warren L. Scott v. Frederick L. Schnadt.

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70	128
70	25
91	308

1. *COURTS—Power to Extend Time to File Bill of Exceptions.*—The time for filing a bill of exceptions may be extended at a term subsequent to that at which the judgment or decree was entered, without notice to the opposite party, where the time for filing has not expired when the order of extension is made.

2. *DAMAGES—Failure to Deliver Stock—Value of Stock Must be Proved.*—A person agreeing to do certain work for a specified number of shares of the stock of a corporation is entitled to only such damage as he has suffered from a failure to deliver the stock, and in a suit on the contract he must prove the value of the stock.

3. *PAROL EVIDENCE—To Explain Incomplete Contract.*—Where a written agreement provided that one of the parties was to render certain specified services, and "other services," but did not indicate what the "other services" were to be, parol evidence is admissible to show what other services were to be rendered.

Assumpsit, for services. Error to the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed April 15, 1897.

BURTON & REICHMANN, attorneys for plaintiff in error.

ALBERT N. EASTMAN, attorney for defendant in error.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We deem it right, in view of the recent decision of the Supreme Court in *Railway Passenger and Freight Conductors' Mutual Benefit Association v. Leonard*, 166 Ill. 154, that the opinion of this court, filed March 15, 1897, be recalled and the case reconsidered; this being done upon the motion of this court.

The Supreme Court in the case referred to have, for the first time, considered and passed upon the question of the power of a trial court to extend the time for the filing of a bill of exceptions, without notice, at a term subsequent to that in which final judgment was entered, and hold that such extension may under such circumstances be made at any time during the term to which the time for filing has been extended.

In that case a final decree was rendered at the February term of the Superior Court of Cook County; at that term twenty days were given in which to file a certificate of evidence; by subsequent orders the time for such filing was extended to the April term of the court; and on April 18th an order was made extending the time five days from said date; this order was made without notice. The certificate was signed April 23d, and filed April 24th, being at the April term. The court say :

"The time fixed was a day of the April term of court, and the court did not lose jurisdiction of the matter until the end of that term. The court had the power at any time during the term to make a further extension of time, or to order that the certificate be filed *nunc pro tunc*. And while no such order was made, the certificate was filed during the term while the court retained jurisdiction of the matter, and its filing operated as an amendment of the decree in accordance with the order of the court while it had power to so amend it."

Under this holding it is apparent that the bill of exceptions in the case at bar was filed in apt time.

Appellant and appellee entered into the following contract :

Scott v. Schnadt.

“ This agreement, made and entered into this 11th day of November, A. D. 1891, between Warren L. Scott, of the city of Norwich, State of New York, and Frederick L. Schnadt, of the city of Chicago, county of Cook, and State of Illinois, witnesseth :

That the said Frederick L. Schnadt, party of the second part, has rendered services to the said party of the first part in and about the incorporating of the Chicago Paragon Plaster Company, a corporation of the State of Illinois, and has agreed to render other services to said party of the first part in and about said organization.

Now, therefore, in consideration of the said services so rendered by said party of the second part to said party of the first part, said Warren L. Scott, party of the first part, hereby agrees to transfer to said Frederick L. Schnadt, as soon as said organization is completed and the said Scott has had issued to him the stock in said company for which he has subscribed—two hundred and fifty (250) shares of the capital stock of said Chicago Paragon Plaster Company—which shall be in payment of the services so rendered by said second party to said party of the first part. In witness whereof the parties hereto have hereunto set their hands and seals the day and year first above written.

W. L. SCOTT, [SEAL]

F. L. SCHNADT [SEAL].”

Previous and subsequent to the making of such contract appellee endeavored to obtain subscriptions to the stock of said Plaster company—obtaining subscriptions amounting to about \$1,800. No stock of said company was ever issued. Appellant refused to issue the same, his reason being that it would be useless to do so unless \$30,000 in money was raised with which to carry on the business of said company; and appellant claimed that the agreement with appellee was that he was to raise that sum for the company by a sale of its stock, and for such service was to have the 250 shares of stock mentioned in the contract.

The trial court during the progress of the trial virtually denied appellant an opportunity to present his defense.

Appellee, if entitled to recover, is entitled to only such damages as he has suffered from a failure to give to him 250 shares of the stock of the company. What such damage is the record does not show.

As the agreement does not set forth what the "other services" mentioned in the agreement were to be, parol evidence is admissible to show what other services appellee was to render.

The judgment of this court heretofore entered will be set aside, and the judgment of the Superior Court reversed and the cause remanded.

Henry B. Huntington v. Eva Aurand.

1. *PRACTICE—Docketing Causes.*—Where judgment has been obtained on an appeal bond it is not material whether the cause be redocketed before or after further breaches are assigned.

2. *SAME—Leave of Court to File Assignment of Breaches of an Appeal Bond.*—Leave of court need not be obtained to file an assignment of breaches of an appeal bond after judgment thereon. Such an assignment stands for and virtually is a declaration.

3. *EVIDENCE—When Objections Must be Specific.*—The rule is uniform that objections to evidence that may be cured at the trial, must be specifically pointed out, and an objection "to the introduction of said draft of decree" will not be sustained on appeal where the only ground of objection is that the draft is secondary evidence, and that the original decree should have been produced.

4. *BONDS—What Breaches of, May Form the Basis of a Recovery.*—Any breach of the condition of a penal bond, for which damages have not already been assessed, forms the proper subject-matter for a new assignment and assessment, even though such breach may have occurred prior to a former assessment.

Action, to assess damages for breaches of an appeal bond. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

FRANK SCALES and R. FRANKENSTEIN, attorneys for appellant.

F. S. MURPHEY, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is a proceeding to assess damages upon an assignment of breaches of the covenants of an appeal bond under Sec. 21 of the Practice Act.

The facts in the case, as stated in appellant's brief, are:

"Ambrose J. Aurand appealed to this court from a decree entered in the Circuit Court of Cook County in favor of appellee here, granting her separate maintenance and an allowance of \$50 a month alimony. This court, upon hearing, partially affirmed the decree of the Circuit Court, but reduced the alimony to \$30 per month.

Upon appeal to the Supreme Court the case was there affirmed, and after the case was redocketed in the Circuit Court a decree was entered therein in conformity with the opinions of the Appellate and Supreme Courts.

Appellee then brought action against appellant upon his bond for \$1,000, given on the appeal from this court to the Supreme Court, and recovered judgment for alimony due for the months of January, February, March and April, 1896, amounting to \$120 and interest; also for solicitor's fees, amounting to \$200. This case was appealed to the Appellate Court, and at the October term, 1896, partially affirmed, being reversed as to the \$200 solicitor's fees.

After the remanding of his last case appellee caused to be filed an assignment of breaches of covenant, under Sec. 21 of the Practice Act, to assess her further damages. The case was tried without formal pleading being asked or required, a jury being waived."

The assignment of breaches was as follows, omitting the title:

"And for a further assignment of breaches of the covenant and conditions of the bond in the declaration herein mentioned, and by leave of court first had and obtained, the said plaintiff, Eva Aurand, says that the final order and decree of the Circuit Court of said county in the said case

of Eva Aurand (plaintiff herein) and the said defendant Ambrose J. Aurand has remained in full force and effect from May 16, 1894, up to the present time, unmodified or discharged in any way, whereby and by the terms of said decree the said defendant Ambrose J. Aurand was ordered and decreed to pay to the plaintiff \$30 at the end of each month, commencing on the 16th day of May, 1894, until the further order of said court, for the support of plaintiff, and thereby the said defendant Ambrose J. Aurand became and was liable to pay to plaintiff other installments of \$30 per month for her said support on said bond, which became due and payable on the 16th day of every succeeding month, to wit: \$30 on the 16th day of June, 1894, and on the 16th day of every succeeding month until the further order of court, with lawful interest on all deferred payments of said installments.

Plaintiff avers that there is now due and unpaid under the said decree and bond sued on the following sums and installments, to-wit, \$30 for the month ending November 16, 1895, and \$30 on and for the month ending December 16, 1895, and \$30 for the month ending May 16, 1896, and \$30 for the month ending June 16, 1896, and \$30 for the month ending July 16, 1896, and \$30 for the month ending August 16, 1896, and \$30 for the month ending September, 1896, and \$30 for the month ending October 16, 1896, and \$30 for the month ending November 16, 1896, and \$30 for the month ending December 16, 1896, and \$30 for the month ending January 16, 1897, and also \$50 interest on said deferred installments as aforesaid, all which said sums became and were due on January 16, 1897, together with costs in the original suit of Aurand v. Aurand.

Avers that defendant Ambrose J. Aurand and Henry R. Huntington have refused and neglected to pay same, though often requested, to the damage of plaintiff of \$500," etc.

It is urged that this further assignment of breaches was filed before the cause was redocketed in the Circuit Court after this court had, upon appeal, partially affirmed the judgment recovered against appellant in the original action

Huntington v. Aurand.

in debt brought upon the appeal bond signed by him in the case of Aurand v. Aurand—which is the same bond under which these further breaches were assigned. The mandate of this court affirming said judgment was filed in the court below January 6, 1897, and it does not seem to be material whether that cause was redocketed before or after further breaches were assigned.

The cause was redocketed January 22, 1897. The assignment of these additional breaches was filed January 15, 1897, and on the same day notice was given that they had been filed, and that on January 27, 1897, which was more than ten days ahead, the court would be moved for an inquisition of damages on such breaches. That was all the notice that the statute seems to contemplate. Sec. 21 of the Practice Act.

It is also urged that no leave of court was obtained to file the assignment of breaches.

Leave of court need not be first obtained to file an assignment of breaches, any more than it need be in order to file a declaration, which an assignment of breaches stands for, and virtually is.

It is next urged that errors were committed in the admission of evidence, and such alleged errors are based upon the admission of the original draft of the decree in Aurand v. Aurand, in which case the appeal bond signed by the appellant was given, and in the admission of a certified copy of that bond.

The draft of a decree ordered to be entered in a cause is not the best evidence of the decree that has been entered, and if there had been a proper objection and exception interposed, we should have been obliged to hold that the error was well assigned. The objection made was, merely, "to the introduction of said draft of decree," without specifying any reason therefor. To have been a good objection it should have stated the grounds therefor, so that it could then and there have been obviated by the introduction of the better evidence, or a proper foundation laid for its introduction as secondary evidence. The rule is uniform that

objections that may be cured at the trial must be specifically pointed out on the trial. The other alleged error, in admitting a certified copy of the appeal bond, is subject to the same remarks, and also to the further remark that it was immaterial evidence and did no harm. The judgment in the original action brought upon that bond, and which was affirmed upon appeal to this court, established the bond and appellant's liability upon it. The proceeding was for further breaches of it merely.

It is next urged in appellant's brief that it was error to give judgment for the installments of alimony due for the months of November and December, 1895, such installments being due at the time the original action was brought, in May, 1896, against appellant upon the bond executed by him, in which action judgment was obtained for the installments due for the months of January, February, March and April, 1896, for the reason that alimony for those months of November and December was then due and should have been included in that action, and could not be included in this proceeding.

Whether the premises stated in appellant's brief in that regard are borne out by the record of the judgment in the action said to have been begun in May, 1896, we have no means of verifying, that judgment not being in this record. In this suit the breaches assigned are for defaults made in the payment of installments due on the 16th days of those months of November and December, 1895, and also on the 16th days of each of the months of May, 1896, to January, 1897, inclusive, and we have no knowledge, derivable from this record, concerning what has happened with the installments due for other months.

It would seem, however, that the decisions of the Supreme Court in *People v. Compher*, 14 Ill. 447, and *McDole v. McDole*, 106 Ill. 452, settle the question against the contention of appellant, upon the facts being as stated by him.

The next point made by appellant is that the judgment is excessive, and, with previous payments, more than exhausts the penalty of his bond.

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The penalty of his bond is \$1,000. The only payment claimed to have been made by appellant is \$123.50, said to be in satisfaction of a former judgment against him upon the bond.

The only evidence of any other payments having been made under the original decree awarding the alimony, was that Aurand, the defendant in that decree, had paid \$668.30 for alimony from the entry of the decree up to November, 1895.

It seems to be plain that appellant has no valid defense to the judgment, and it will be affirmed.

North Chicago Hebrew Congregation v. John G. Garibaldi.

1. *TAXES—Statutes Granting Exemptions Construed Strictly.*—Statutes exempting property from taxation are strictly construed; every presumption is in favor of the liability to taxation.

2. *SAME—Effect of Judgment for, in Suit for Breach of Warranty—Duty to Appeal.*—A conveyed certain property to B by deed of general warranty. Later a judgment was rendered against the property, for taxes becoming a lien prior to the execution of the deed. B paid the taxes and sued A for the amount. *Held*, that the judgment of the County Court, in the absence of a showing to the contrary, established that the premises in question were lawfully assessed and burdened with such taxes and that B was not bound to appeal from the judgment therefor.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

DAVID EICHBERG, attorney for appellant.

YOUNG, MAKEEL & BRADLEY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Prior to June 8, 1891, appellant owned and used, exclusively for church purposes, certain premises in Chicago.

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Upon that date it sold and conveyed the same to appellee, giving him a deed with full covenants of warranty.

No further transactions relating to said matter occurred until on July 5, 1892; F. W. Young, attorney for appellee, wrote David Eichberg, attorney for appellant, a letter referring to said deed, and stating that the property had been taxed for the year 1891. A short time thereafter, Mr. Young and Mr. Eichberg met, and, after a conversation, the former agreed to file objections to the application of the county treasurer of Cook county for judgment against said premises for the taxes of 1891. There was a misunderstanding as to who should attend to the objections on the hearing. Mr. Young states Mr. Eichberg agreed to do so, while Mr. Eichberg denies that he so agreed, and says he only agreed to furnish the evidence at such time.

On July 12, 1892, appellee's attorney filed his objections in the County Court. Later, there followed some correspondence between Mr. Young and Mr. Eichberg relating to the objections filed and the payment of taxes. On July 14, 1892, the objections of appellee so filed were overruled by the County Court, and judgment entered, and at such time neither Mr. Young nor Mr. Eichberg was present. Appellee paid the sum of \$174.02 in full for such taxes of 1891, on August 2, 1892, before the sale thereof, which sum has never been paid to said appellee, the appellant denying all liability therefor.

Upon the hearing the court found for appellee, and rendered judgment thereon. From this judgment an appeal is taken to this court.

Section 2 of the revenue act of this State provides that "all church property actually and exclusively used for public worship when the land (to be of reasonable size for the location of the church building) is owned by the congregation," to the extent herein limited, shall be exempt from taxation. It is further provided in said act that the lien for taxes attaches to "all property in this State subject to taxation under this act," so far as transfers are concerned, on the first day of May of each year. Paragraphs 58 and 59.

It does not appear whether the premises, lot one in the

Kelley v. Leith.

subdivision of block eight, etc., were of reasonable size for the location of the church building, and therefore it was not shown that the premises were exempt from taxation.

Statutes excepting property from taxation are strictly construed; every presumption is in favor of the liability to taxation. 25 Am. & Eng. Ency. of Law, 157.

The taxes for the year 1891 became a lien and charge upon the premises upon the 1st day of May of that year. Secs. 59 and 253 of Revenue Act; *Alny v. Hunt*, 48 Ill. 45.

The judgment of the County Court, in the absence of any showing to the contrary, established for the purposes of this case that the premises in question were lawfully assessed and burdened with the taxes in question on the first day of May, 1892. *Warren v. Cook*, 116 Ill. 204.

It is true that appellee could have appealed from this judgment, but he was not bound to do so; nor is there anything showing that such appeal could have been prosecuted with effect. So far as is shown there was before the County Court no evidence that the premises were exempt from taxation. Appellant was notified by appellee of the proceeding in the County Court, and that it was expected that it would attend to the matter when it came up for hearing. This it neglected to do.

Appellee properly paid the taxes to prevent a sale of the property, and was entitled to recover upon the covenants of warranty made to him.

The judgment of the Circuit Court is affirmed.

David Kelley v. Alex. B. Leith et al.

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176 311

1. VOLUNTARY ASSIGNMENTS—*Payment of Claims as Inducement to Consent to Discontinuance.*—An insolvent may arrange to give security upon his assets after a discontinuance of assignment proceedings, for the purpose of obtaining money with which to pay all uncontested claims immediately and in full, and a discontinuance should not be refused on account of the fact that creditors were told of the existence of such an arrangement, as an inducement to them to sign consents to a discontinuance, and the further fact that payment of contested claims was to be delayed until judgments had been obtained.

2. APPELLATE COURT PRACTICE—*Filing New Bonds.*--A motion to dismiss an appeal on account of the insufficiency of the bond may be overruled, and an appellant permitted to file a new bond.

Assignment Proceedings. — Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Mr. Justice GARY dissenting. Opinion filed April 15, 1897.

STATEMENT OF THE CASE.

On July 27, 1896, the appellees, Leith, Hampton and Adams, constituting a copartnership trading under the name and style of the "Fulton Machine Works," made their deed of general assignment as such partners, to one Robie as assignee for the benefit of the creditors of such partnership. The assignee proceeded to administer the estate, and continued to do so until the 28th day of November, 1896, when an order was entered upon the petition of the insolvents, discontinuing the proceedings and directing the assignee to return the assigned property to them.

The assignee had duly given notice to creditors to file claims against the insolvents, and a large number of claims were so filed, including one by the appellant in this case, for the sum of \$6,243.32. At the hearing of the motion for a discontinuance of the proceedings, it appeared that a majority in number and amount of the creditors, whose claims had been filed with the assignee, consented to such discontinuance. The motion for a discontinuance was opposed by the appellant, upon the ground that the consents of the consenting creditors had been procured by an unlawful arrangement between them and the insolvents.

In support of such contention, Mr. Ashcraft, attorney for the insolvents, was examined as a witness, and from his testimony it appeared that on November 21, 1896, he addressed to each of the creditors (except three, whose claims were contested by the insolvents, although no exception to their allowance had been filed,) a letter, in which he stated that he had arranged to raise funds to settle all uncontested claims against the insolvents, and in which he requested the person addressed to execute an assignment of his claim and

place same in the hands of F. E. Brown, assistant cashier of the First National Bank, and also to sign a petition for a discontinuance of the insolvency proceedings, and to place same in the hands of Brown, with instructions to deliver such assignment and consents to him (Ashcraft) upon payment of the amount due such creditor.

With this letter was enclosed to each creditor a blank form of consent to the discontinuance of said proceeding, and a blank form of assignment, by which the claim of such creditor was assigned to Robert C. Robinson, an attorney in the office and employ of Mr. Ashcraft. Before sending out these letters, Mr. Ashcraft had made arrangements with one Herbst to loan the insolvents a sum of money sufficient to pay off all the debts except those contested; but, as he states he has been unable to find any one who was willing to advance money to pay off all the claims, including the contested ones.

The arrangement between the insolvents and Mr. Herbst was that business was to be resumed; that the receipt and payment of all moneys arising out of the business was to be conducted through Herbst; that he (Herbst) was to have a chattel mortgage for \$75,000 upon the property of the insolvents to secure the money thus advanced, that sum being necessary in order to pay all the creditors in full and leave a working capital of \$12,000. That out of the money so advanced all of the claims against said insolvents, whether they had been filed with the assignee or not, were to be paid in full, except the contested claims, including that of the appellant. Herbst was to participate in the management of the business for six months, for which he was to have a salary of \$2,000 a month (\$12,000) in addition to interest at the rate of seven per cent per annum upon the amount of money to be loaned by him to the insolvents, which sum of \$12,000 was to be included in the chattel mortgage, if desired by him. That the contested claims amount to from \$7,000 to \$8,000; that it is the intention and plan of the insolvents to pay in full all of the contested claims for which judgment shall be obtained.

In pursuance of this arrangement the creditors who con-

sented to the discontinuance of the proceedings signed such written consents and assignments of their claims and placed them in the hands of Mr. Brown, as requested, and the consents were delivered by Mr. Brown to the insolvents, or their representative, and at the same time, checks for the amount of the claims thus represented were delivered to Mr. Brown, upon an understanding that they would not be presented until the order of discontinuance was entered. The County Court overruled appellant's objection to the entry of the order and entered an order discontinuing the proceedings and directing the assignee to restore the assigned property to the insolvents. From this order this appeal is taken.

DEFREES, BRACE & RITTER, attorneys for appellant.

F. M. Cox, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The inventory of the assignee filed in the County Court, shows assets estimated to be worth.....\$163,155.02
and liabilities amounting to..... 58,793.84

Seventy-nine claims were filed within three months after notice given, amounting in all to.. 64,752.87
of which appellant's claim is..... 6,243.32

Leaving the proven uncontested claims.....\$ 58,509.55
being several hundred dollars less than the statement made in the inventory of the assignee.

It is urged that the order of discontinuance in this case was held to be, under such circumstances, improper in *Howe v. Warren*, 154 Ill. 227; *Terhune v. Kean*, 155 Ill. 506; *Am. Exch. Bank v. Walker*, 60 Ill. App. 510; *Same v. Same*, 164 Ill. 135; *Stoddard v. Gilbert, Sheriff*, 62 Ill. App. 70, is also referred to.

The language used in the cases mentioned is to be understood with reference to the causes, respectively, in which it was uttered.

In the present case it is undisputed that the intention has

been and is to pay all creditors in full, those whose claims are uncontested at once, those disputed, as soon as judgment is obtained thereon.

There is no pretense that the contest of the disputed claims is not in good faith and with an honest and just purpose.

If, as is contended, the insolvents can not arrange to give security, after the discontinuance, upon any portion of their assets, for the purpose of obtaining money with which to pay immediately all just claims in full, but must, in order to obtain a discontinuance under such arrangement, also pay at once all, possibly, unjust claims, it is evident that for practicable purposes the section of the statute providing for a discontinuance has no existence.

From beginning to end of this assignment there has been in the conduct of the insolvents nothing that smacked of dishonesty or unfairness. Compelled, by an unfortunate mistake of a *creditor*, to make an assignment, they have arranged to pay without delay all undisputed claims; leaving themselves in a condition where there is every reasonable prospect that they will pay every just claim, and yet preserve their business.

If the law, under these circumstances, dooms them to a loss of all they have, without benefiting anybody, it is unfortunate.

We do not think that the Supreme Court has held unlawful a discontinuance procured in the manner the one under consideration was obtained.

A motion to dismiss the appeal because a proper bond was not filed has been overruled and appellant permitted to file a new bond. Such action of this court is in accordance with *Hammond et al. v. The People*, 164 Ill. 455.

The order of the County Court is affirmed.

MR. JUSTICE GARY.

I can not concur. I read what the Supreme Court has said as forbidding a discontinuance in pursuance of arrangements by which the assets are trammelled after they are returned to the insolvents.

Morris H. Vehon v. Joseph Vehon.

1. **CONSIDERATION—*Debt of a Third Person.***—A note for the amount of a debt owing by the father of the payer, which the payer is under no obligation, legal or moral, to pay, and upon which the giving of the note has no legal effect, there being no release of the father or extension of credit to him, is without consideration and voidable.

2. **SAME—*Fear of Trouble.***—Fear of trouble with the payee of a note where there is no evidence to show that such payee had any right to make trouble, can not be moulded into a consideration for such note.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed. Opinion filed April 15, 1897.

M. SALOMON, attorney for appellant.

What is known in law as a good consideration, such as gratitude, moral obligation, love, etc., will not support an executory contract, as a note. Such consideration will generally support an executed contract. To maintain an executory contract, such as the note in this case, there must be a valuable consideration involved in the transaction. *Hamor v. Moore's Adm'r*, 8 Ohio St. 241; *Kirkpatrick v. Taylor*, 43 Ill. 207; *Williams v. Forbes*, 114 Ill. 169; *Kirschner v. Spranger*, 4 Pa. Dist. 144.

The mere debt of another for which a note is given would not be a consideration, because there is not valuable consideration to such a transaction. To make a consideration in such a case there must be not only an absolute release of the original debtor, but there must be outside circumstances showing the release by the creditor of a valuable right and the accrument to the maker of the note of an advantage or gain that he had not before. *Wilson v. Tucker*; 64 Ind. 41; *Leverone v. Hildrath*, 80 Cal. 139; *Security Bank v. Bell*, 32 Minn. 409.

D. V. SAMUELS and W. I. CULVER, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action by the appellee against the appellant upon a promissory note, commenced by attachment.

The defense is that the note was without consideration, upon which subject the evidence most favorable to the appellee is that the father of the appellant was indebted to the appellee, his brother; was in business in Iowa, and the appellant wished to move his father and mother and the goods to Galesburg, Illinois.

There is, at the most, a suggestion in the testimony that the appellant feared that the appellee would make some trouble about such removal, and so with no communication between the brothers, or between the appellant and his father upon the subject, the appellant gave his note to the appellee for the amount of such indebtedness.

There is no hint of any release of the father of the appellant, or any promise to him of extension of credit or forbearance by the appellee.

The transaction is simply that the appellant gave his note for the amount of a debt owing by his father; a debt which the appellant was under no obligation, legal or moral, to pay, and upon which debt the giving of his note had no legal effect.

There was, therefore, no consideration for the note sued upon. Tiedeman Com. Pap., Sec. 170; 2 Randolph Com. Pap., Sec. 466.

Fear of trouble with the appellee as to the goods which the appellant wished to bring to Illinois, with nothing to show that the appellee, had any right to make trouble, can not be moulded into a consideration. Heaps v. Dunham, 95 Ill. 583.

An agreement to forbear or give time to the father of the appellant can not be implied from the fact that the note was payable one year after date, when the case shows clearly that no agreement with him, nor any agreement taking him into account, was made.

The case is merely that the appellee persuaded the appellant to give his note for the debt his father owed.

There being no cause of action, we need not consider the attachment.

The judgment is reversed without remanding the cause.

**People, etc., ex rel. Chicago General Railway Company
v. Samuel B. Chase, Recorder, etc.**

1. **RECORDER'S FEES**—*For Recording Plats.*—Where the land comprised within a plat is divided into separate pieces by lines and figures thereon, each piece may properly be counted as a parcel or tract in figuring the fee to be paid for recording such plat.

2. **MANDAMUS**—*Showing Required.*—The right to a writ of mandamus must be clear to warrant a court in granting this extraordinary remedy.

Mandamus, to compel the recording of a plat. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

STATEMENT OF THE CASE.

Relator is a corporation organized under the laws of the State of Illinois for the purpose of operating street railway lines in the city of Chicago in Cook county, and as such laid its tracks in West Twenty-second street and across the right of way of the Chicago, Burlington & Quincy Railroad Company, thence across or on certain lots and into and along said West Twenty-second street again. As required by Section 9, Chapter 109, Revised Statutes, it caused a plat or map thereof showing the width, courses and extent thereof, and made thereon such reference to known and established corners or monuments that the location thereof might be ascertained, and took such plat to the recorder of deeds of Cook county, and tendered it to him to be recorded in his office. The recorder, making no objection to the plat, offered to record the same upon the payment by the relator of the sum of \$5.05, and refused to record it without the payment of that sum, whereupon relator tendered \$1.39 in full payment of recorder's fees, which tender was rejected.

Relator then filed its petition for a writ of mandamus to compel the recorder to receive and record the plat.

The following is a true copy of the plat in question :

JESSE B. BARTON, attorney for appellant.

FRANK L. SHEPARD, Assistant County Attorney, attorney for appellee; ROBERT S. ILES, County Attorney, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Section 2 of an act in force March 2, 1874, as to fees in counties of the third class, is as follows:

“FEES OF RECORDER OF DEEDS.

For recording any deed or other instrument in writing, for every one hundred words, eight cents, and twenty-five cents for the certificate of the recorder of the time of filing the deed or instrument for record, and the book and page of the record.

For recording maps or plats of additions, subdivisions, or otherwise, for each tract, parcel or lot contained therein, eight cents, and twenty-five cents for the certificate of the time of filing the same for record, and the book and page of the record thereof.”

We have been favored with an argument by counsel for appellant in which it is contended that the only fee properly chargeable in connection with recording this plat is twenty-five cents.

The question presented to us is whether the Superior Court should have issued a writ of mandamus upon the showing that the recorder had, upon tender of \$1.39, refused to record the plat.

From an examination of the plat, we do not think it is clear that the fee fixed by law for recording this plat is not more than \$1.39. The plat contains several hundred words, for recording which a fee of eight cents per hundred is prescribed.

A parcel is a portion of anything taken separately, a fragment of a whole—in law, a part, a portion, a piece.

A tract, as applied to land, is an area, or a region of land or water of indefinite extent. Webster's Dictionary.

The terms “tract” and “parcel” may properly be applied

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to a quarter section, a half section or a section of land. *Martin v. Cole*, 38 Iowa, 141.

A part of an estate may be described as a parcel. 1 Comyn's Dig., Abatement (H. 51), Grant (E. 10).

The land comprised within the plat is by lines and figures thereon divided into separate tracts, each of which may properly be termed a parcel or tract. The number of these is such that it is not clear that \$1.39 is the entire fee allowed by law for recording the instrument in question.

The right to a writ of mandamus must be clear to warrant a court in granting this extraordinary remedy. High on Extraordinary Remedies, Sec. 10.

The recorder does not refuse to record the plat; he merely insists upon a larger fee than the petitioner thinks is lawful. It does not appear that the petitioner is unable to pay this fee, or will be put to serious inconvenience in doing so. If the recorder exact an illegal fee, the remedy of the petitioner, if he pay the same, is clear. Sections 213 and 214, Chapter 38, Revised Statutes.

The judgment of the Superior Court is affirmed.

Lake Shore & M. S. Ry. Co. v. Patrick A. Ryan.

1. **LIMITATIONS**—*Additional Counts Stating the Same Cause of Action*.—Where additional counts are for the same injury as that stated in the declaration as originally filed, only varying the story as to the manner in which the acts complained of were performed, a demurrer to a plea of the statute of limitations is properly sustained if the original declaration was filed in time.

2. **MASTER AND SERVANT**—*Duty of Servant to look for Defects in Machinery*.—A brakeman is not required to look after dark for defects in a car which he has reason to believe has passed inspection by the company on the day it is used.

3. **INSTRUCTIONS**—*Refusal to State a Proposition Twice not Error*.—The refusal to give an instruction, the whole legal effect of which was in another that was given, can not be complained of as error.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

WM. McFADON, attorney for appellant.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was a brakeman, employed by the appellant, and November 25, 1892, at about 7:15 P. M. attempted to go down from the top of a freight car of a train that was being backed by an engine. The car was next to the engine, and he had gone upon it from the engine some fifteen minutes before.

In attempting to go down, for the purpose of uncoupling the engine when the train should be stopped, as it was about to be, he fell by reason, as he alleges, of a "hand hold" being so bent down that he could not take hold of it. This "hand hold" was, as we understand, the continuation of a ladder down the end of the car, and was the upper rung of that ladder. It should have stood on the top of the car, a little way from the end, with a space of about two and one-half inches between the five-eighth inch bar of iron and the top of the car, so that as a rung of the ladder it could easily have been grasped; but in fact it was so bent down that it could not be grasped. He had been with the train with that car in it for more than an hour, and when he went from the engine upon the car, that rung was within reach of his hand.

The appellant contends that both by general law and special contract, the appellee was bound to take notice of the condition of that rung before attempting to use it. By his contract of employment he engaged that he would for his own safety, examine the things in connection with which he worked before using them, so as to ascertain so far as he reasonably could, their "condition and soundness."

The company had inspectors who should have discovered the defect. As to the appellee we will take notice that there is little light after six o'clock P. M. in the last week of November. In going upon the car the appellee had no occasion to touch the rung. Did either the law or his contract require him to look after dark for defects in a car

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which he had reason to believe, and, as we understand was the fact, had passed inspection by the appellant the same day? That the defect could have originated after the inspection, there is no reason to suspect.

The case then comes to this: A rung placed upon the top of the car for the use of brakeman was so bent down that the appellee could not get hold of it; had it been in condition the appellee would not have been hurt; it had been passed as in good condition that day by the appellant; the appellee was after dark put by the appellant in the place where he would, in the ordinary course of events, need to use the rung in the dark. Under such circumstances we may not say that the jury was wrong in finding that the appellee was injured through the negligence of the appellant without fault on his part, either as to care for his own safety or observance of his contract.

The original declaration was filed May 16, 1893, and June 7, 1896, additional counts were filed, to which the appellant pleaded the statute of limitations. To these pleas the court rightly sustained demurrers. All the counts were for the same injury, only varying the story as to the manner of the negligence of the appellant. *Liebold v. Green*, No. 6899 this term, citing *Illinois Steel Co. v. Eysenfeldt*, 62 Ill. App. 552, 165 Ill. 185, and *Ellison v. Georgia R. R.*, 87 Ga. 692; *C., St. P. & K. C. Ry. v. Ryan*, 62 Ill. App. 264, 165 Ill. 88.

Complaint is made of the refusal of one instruction, the whole legal effect of which was in another that was given. In this was no error. *A., T. & S. F. R. R. v. Feehan*, 149 Ill. 203, cited among a multitude of cases in 4 *Kinney's Digest*, 4331-2.

The appellee was earning an average of \$90 per month; was thirty-two years old, and is incapacitated for his former avocation or other heavy manual labor. We may not say that the damages, \$6,000, are excessive. Even his pecuniary loss exceeds the damages.

There is much minor criticism of the proceedings, and subdivision of the argument for the appellant; of which it is enough to say that on the whole case there is no reason why the judgment should be reversed, and it is affirmed.

Ferdinand Brettschneider v. The Fair.

1. **BILL OF EXCEPTIONS**—*When Regarded as Incomplete.*—Where many papers which are not in a bill of exceptions were offered in evidence and seen by the court trying the case without a jury, and it is clear that the judge regarded them as part of the proofs, though there be no formal statement that they were received in evidence, the bill of exceptions will be treated as incomplete.

2. **JUDGMENTS**—*Presumed to be Right.*—A judgment is presumed to be right until it is shown to be wrong, and where, from what is before it, a court of appeal can not say that a judgment appealed from is wrong, it must be affirmed.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed March 29, 1897. Rehearing denied. Opinion on petition for rehearing filed April 15, 1897.

PEDRICK & DAWSON, attorneys for appellant.

MASTERSON & HAFT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 14, 1896, judgment was entered for the appellee, defendant below, and leave given to the appellant to file a bill of exceptions within sixty days.

January 12, 1897, an order was entered thus: "On motion of defendant's attorney it is ordered that the time for the defendant to file the bill of exceptions herein be and the same is hereby extended twenty days."

That is nonsense, as the defendant wanted no bill of exceptions, but it does not follow that we are to read the order with the word plaintiff substituted for the word defendant. The order does not intimate that the plaintiff did come, though the case shows that he only had any cause to come.

But further than this, if the word plaintiff were substituted, then the order would appear to be one entered after

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the term at which the judgment was entered had expired—without notice to the adverse party—and therefore void.

The motion of the appellee to strike out the bill of exceptions which was filed February 1, 1897, is sustained; and with less regret because it does not contain all the evidence put in on the trial, and the merits seem to be with the appellee on what evidence is in.

The judgment is affirmed.

Albert H. Baldwin v. Economy Furniture Co.

1. *APPEARANCE—When Deemed to be General.*—Where a party appears for purposes other than to show that he is not properly before the court, he is deemed to have entered a general appearance for all purposes.

2. *SAME—Effect of Writing Consenting to Action.*—Any writing filed in the papers in a cause not going to the jurisdiction of the court, which asks or consents to action by the court in the cause, must be treated as a sufficient appearance for all purposes.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

FREDERICK S. BAKER, attorney for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant was sued by the appellee before a justice of the peace, and from a judgment there recovered against him appealed to the Circuit Court by filing his appeal bond and a transcript of the justice's judgment in the office of the clerk of that court, but no summons to the appellee was ever issued, and no appearance by the appellee, except as herein-after mentioned, was entered.

Afterward, on November 5, 1896, the case was called for trial, and the appellant being unprepared, a jury having heard evidence offered by appellee, returned a verdict for \$150.15 against the appellant.

The appellant moved for a new trial, and also in arrest of judgment, insisting, as grounds therefor, that no appeal summons had been served or issued, and no appearance entered, and no appearance fee paid by appellee; but his motions were overruled, and judgment was entered on the verdict.

In support of his motion for a new trial, an affidavit of appellant's attorney was read, stating the above recited facts, except that he did not state that no appearance fee had been paid by the appellee; and in opposition thereto appellee read a stipulation which was filed in said Circuit Court and cause on April 30, 1896, as follows, omitting venue and title of cause:

"It is stipulated that the above cause may be reinstated and placed for trial.

E. A. SHERBURNE, plaintiff's attorney.

J. C. HENDRICKS, defendant's attorney."

We are not informed what the occasion was for such stipulation, but it is perhaps not an erroneous conjecture that the case had been dismissed on some general call of the docket without, as yet, any record thereof having been made, and that the stipulation was a convenience adopted by the attorneys to avoid the necessity of a motion to vacate, or prevent the entry of, such an order of dismissal.

However that may be, we regard such a stipulation, when made and filed in the court and cause, as a sufficient entry of appearance by the appellee.

Where a party appears for purposes other than to show he is not properly before the court, he is deemed to have entered a general appearance for all purposes. *Abbott v. Sample*, 25 Ill. 107.

The statute only requires that the appearance of appellee may be entered in writing and filed among the papers in the cause. It does not specify anything as to form of such writing. Sec. 68 of the act of 1872, concerning Justices. See also *Bessey v. Ruhland*, 33 Ill. App. 73.

There may be a possible question whether that section was repealed or not by the later revision of 1895. Sec. 2 Starr & Curtis (2d Ed.) Annotated Stat., Sec. 177, Ch. 79; and Hurd's R. S. (Ed. 1895), Sec. 173, Ch. 79, but we think not.

Anyhow, the case was in the Circuit Court properly, and such a stipulation must be given the effect of a submission by appellee to its jurisdiction. It clearly would not be allowed to appellee to thereafter deny that it had appeared in the cause in that court.

Any writing filed in the papers in the cause by the appellee, not going to the jurisdiction of the court in the cause which asks or consents to action by the court in the cause, must be treated as a sufficient appearance by him for all purposes.

This stipulation was filed more than five months before the term at which the cause was called for trial; the cause was at issue, and appellee was properly in court, and it was not error for the court to hear the cause and render the judgment that is appealed from.

If it were material that appellee's appearance fee should have been paid on or before ten days previous to the term at which the cause was heard, there is nothing in the record, except the statement in appellant's motion for a new trial, that it was not so paid.

The page entitled "Clerk's Law Register" in bill of exceptions, is in no manner referred to, or in any way explained, and amounts to nothing from which even an inference may be drawn, one way or the other, as to any fact in the case. The judgment is affirmed.

L. R. Williams v. Charles H. Scott.

1. **ERRORS—Not Affecting the Result Need not be Considered.**—Errors in the admission or rejection of evidence, which could have had no effect upon the result, need not be considered by a court of appeal.

2. **MASTER AND SERVANT—Wrongful Discharge—Continued Readiness to Perform not Necessary.**—It is the duty of a servant discharged wrongfully, to earn what he can after his discharge, and the words,

"and from thence until the expiration of the period of his employment." in an averment of readiness to perform, are surplusage and need not be proved.

Assumpsit, for a wrongful discharge. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

SLUSSEE & JOHNSON, attorneys for appellant.

JOHNSON, HERRING & BROOKE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant was the proprietor of the Park Gate Hotel during the World's Fair season of 1893, and engaged the appellee as steward at \$200 per month a little before May 1, 1893. At the end of June, 1893, the appellant discharged the appellee. So far there is no dispute on the facts. The case of the appellee is that he was engaged for a term—the World's Fair season—to end November 1, 1893, while the appellant insists that the engagement was only for a month on trial at \$200. As the appellee worked two months, the month on trial seems to cut but little figure in the controversy. On trial implies that something was depending upon the result of the trial.

The preponderance of the evidence is with the appellee as to the terms of the engagement.

That there was any cause given to the appellee for the discharge is not proved, and it is clear that it was against his will, while he was ready, able and willing to continue in the service. He vainly endeavored to find employment during the next four months.

He sued, and has recovered \$500.

Errors, if any there be, in the admission or rejection of evidence which could have had no effect upon the result, need not be considered.

It was his duty to make efforts to earn what he could after his discharge, and such efforts do not defeat his action, though his declaration does aver "that at the time of his

Kintz v. Starkey.

discharge and from thence until the expiration of the period of his employment he was ready, able and willing," etc. The words "and from thence until the expiration of the period of his employment" are surplusage, which need not be proved. 1 Greenl. Ev., Sec. 51.

The appellee might have sued the day he was discharged, and the trial not coming on until the term of service had ended he would have been entitled to recover his whole salary, less what he could have earned. Mount Hope Cem. Ass'n v. Weidenmann, 139 Ill. 67.

In such an action continued readiness could not have been averred, which proves that such an averment was needless.

The judgment is affirmed.

S. T. Kintz v. H. Starkey.

1. *PRACTICE—Right to Address the Jury Absolute.*—The right of a party litigant to address the jury by his counsel is absolute. Lanau v. Hibbard, Spencer, Bartlett & Co., 63 Ill. App. 54, approved and followed.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed April 15, 1897.

PHILIP KOEHLER and HENRY A. WILDER, attorneys for appellant.

Argument of counsel is a matter of right. The argument of a cause is as much part of the trial as the hearing of the evidence. A party to a civil suit has a right to be heard either by himself or by counsel, not only in the testimony but also in the argument of his case. No matter how weak or inconclusive the case may be, if it is enough to present a disputed question of fact the counsel of the party has a right to present his client's case to the jury. Douglass v. Hill, 29 Kas. 527; Nedig v. Cole, 13 Neb.; Mayo v. Wright,

63 Mich. 32; Thompson v. People, 144 Ill. 378; Merideths v. People, 84 Ill. 479; Cartwright v. Clopton, 25 Mich. 285.

ARCHIBALD CATTELL, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Except in the names of the parties, and the court whence this appeal comes, this case is like Lanau v. Hibbard, 63 Ill. App. 54, and to preserve the parallel the judgment is reversed and the cause remanded.

Edward Otto v. H. Matthie.

1. HUSBAND AND WIFE—*Family Expenses*.—Diamond ear-rings, a watch given to a daughter of the wife by a former marriage and not a member of the family of the husband, and a chain given to the lover of a servant, can not be considered as family expenses and chargeable against a husband without his consent.

Transcript, from a justice of the peace. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge presiding. Heard in this court at the March term, 1897. Reversed. Opinion filed April 15, 1897.

ARNOLD TRIPP, attorney for appellant.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was a jeweler, and in a little more than two years, with no acquaintance with the appellant, who was a physician and druggist, the appellee sold to, and repaired goods in his line for the wife of the appellant, without his knowledge, to the amount of \$114.75. At the time of the trial \$40.75 remained unpaid, she having paid the residue.

Among the items were diamond ear rings, \$58, of the destination of which there is no account; a watch, \$10, to a daughter of the wife by a former marriage and not a member of the family of the appellant; a gentleman's chain, \$6,

Pittsburg Bridge Co. v. Walker.

a present to the lover of the cook. As none of these articles can be considered as being in a family expense account, and their combined price much exceeds the unpaid balance of the account, the finding of the court, trying the case without a jury, should have been in favor of the defendant—the appellant.

There is no appearance here by the appellee.

On the authority of *Galfield v. Scott*, 40 Ill. App. 380, and *Harding v. Hyman*, 54 Ill. App. 434; S. C., with title reversed, 162 Ill. 357, the judgment is reversed without remanding.

Pittsburg Bridge Company v. John Walker.

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1. **QUESTIONS OF FACT—Who Are Fellow-Servants—Negligence.**—Who are fellow-servants and whether or not a defendant was guilty of negligence are questions for the jury, and their determination of them should not be disturbed upon such evidence as is contained in the record in this case.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

JOHN A. POST and JOHN B. BRADY, attorneys for appellant.

FRANK SCALES, attorney for appellee; A. STUBBLEFIELD, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In an action brought by the appellee to recover damages for a personal injury sustained by him while in the service of appellant, through the alleged negligence of the servants of the appellant, a verdict for \$3,000 was returned in appellee's favor. From that verdict appellee remitted \$1,000 and

the judgment for \$2,000 entered against appellant is now appealed from.

Although assigned as error that the damages are excessive, all claim on that account is abandoned upon the argument.

The questions of whether appellee was injured through the fault of a fellow-servant, and whether the risk was not one that he assumed, are the most important ones in the case.

The appellant was engaged in constructing an iron structure known as the Halsted street bridge, in Chicago, and appellee had worked at and about the bridge as a common laborer for the appellant some three or four months, under a foreman or different foremen. The general superintendent was a Mr. Lyons, who told appellee to do whatever he was told to do by a Mr. Farnsworth, who is sometimes spoken of as assistant superintendent or foreman; again as foreman in charge of the structural iron work, at times, and who himself testified in behalf of the appellant, that on the day of the injury he was a "common workman the same as anybody else."

A Mr. Clark was the yard boss in charge of the yards where the bridge material was taken off railroad cars, sorted, and loaded upon a scow in the river for transportation to the site of the bridge.

Appellee was transferred to such yards, from work upon and about the bridge, about a month before the accident, and was there at work in what is spoken of as "Mr. Clark's gang" when he became hurt.

On the day in question Mr. Farnsworth went to the yards to get eight struts or sway braces that he said he wanted to go up between the towers of the bridge, and the work of getting them out began at once. Such pieces weighed from ten to fifteen hundred pounds apiece, and were from twenty to twenty-six feet long. They were handled by being loaded upon a handcar by means of a derrick, and then run down a hundred or hundred and fifty feet to near the scow where they were again lifted by an-

other derrick and swung around upon the scow. In doing this work Farnsworth assisted on that day, although he had never done so before. There was evidence that he was in haste to get the struts.

Because of some girders that were lying across the hand-car track, the car, loaded with four struts, could not at that time be got nearer than twelve or fourteen feet from the derrick. Farnsworth hitched the derrick tackles to one of the struts, near the center, and the derrick being so far from the car the strut when lifted was dragged as well as raised, and one end caught and became wedged in the girders that lay across the track, and was held down while the other end was in the air, a few feet high. Farnsworth then took hold of the end that was in the air, and appellee and Clark took hold of and tried to lift the other end loose. Being unable at first to loosen it, appellee, either by order of Farnsworth or of his own volition, stepped over the strut and lifted upon it from that side. The strut becoming loosened by the efforts of Clark and the appellee, it suddenly swung away from both Farnsworth's and their holds—the tackle having been kept taut and "on a very tight strain"—and appellant was struck and thrown or knocked over, and received the broken leg and other injuries of which he complained.

It does not appear that appellee had ever had any experience of handling such heavy material by a tackle operated on such a slant, although he knew all about the ordinary way of moving struts. Farnsworth testified that "the tackles were leaded in maybe forty-five degrees." Both Farnsworth and Clark were, as appellee believed, his superiors in authority, and were both men of many years' experience in the work of handling heavy iron work. Although Farnsworth testified that he was, on that day, nothing but a common laborer, still, in all the three months that appellee worked at the bridge, Farnsworth was his foreman, and it is not claimed that appellee had any notice or information whatever of his reduction from such rank. Clark was appellee's boss at the yard when the accident happened, and

appellee had a right to be warned of dangers that he did not know of, but of which both Clark and Farnsworth must have known.

There is no word of evidence that he was warned by either of them, but there is evidence that Farnsworth encouraged him, and even commanded him to step over the wedged strut and to give another lift at it until he, Farnsworth, might see whether he and Clark could not lift it loose.

Furthermore, Farnsworth had hold of the other end of the strut for the purpose, as he testified, of holding it so that appellee and Clark might get the other end clear. With no warning or explanation, appellee had a right to rely upon Farnsworth to hold and steady the iron so that he should not be injured. The fact that Farnsworth was unable to hold and steady it does not excuse appellant, if Farnsworth were in truth a vice-principal.

Upon the question of whether Farnsworth was a fellow-servant with appellee, we are satisfied the jury came to the correct conclusion that he was not.

As already stated, he had been, on all prior occasions in the course of the work, appellee's superior, and there was no claim of notice to appellee, or knowledge by him of any change in such relationship, and it is clear that appellee still believed him to be his superior. It is contended that Clark was the foreman over appellee, and not Farnsworth. Undoubtedly such was the fact in the absence of Farnsworth. But there was evidence that tended to show that Clark was subject to the orders of Farnsworth. Clark testified guardedly upon that subject. He denied that Farnsworth gave him orders, but admitted that Farnsworth came to him and said, "Jim, I want to get them struts or sway braces that go up between the towers," and that he, Clark, at once went and picked them out, and the work of moving them immediately began, and the load of four struts was put upon the hand-car, and run up to where it was to be transferred to the scow. Then, while Clark was away at the other end of the yard picking out the four remaining

struts for another load, Farnsworth fastened the tackles to the strut that was to be put aboard the scow, and the work proceeded under Farnsworth's directions, until the strut caught on the girder, which occurred before Clark came back. Ray, the laborer who drove the horse at the derrick that did the hoisting, took his signals from Farnsworth.

Farnsworth himself testified that when in the course of the bridge building he wanted material he would go down and have it got out. He said: "I would order Clark to load it on the car or bring it up there."

There can be no question, we think, but that Farnsworth had authority to direct Clark to get out the material, and that, from his general exercise of authority in the entire business, the appellee had the right to rely upon his presence at any part of the work as being that of a vice-principal.

From such evidence as we have stated, read in connection with the testimony of the appellee as to the express orders given to him by Farnsworth, and of Farnsworth's direction to him not to use a guy line, there ready for use, which appellee was about to attach to the strut to keep it from swinging around, we have sufficient evidence to sustain the verdict.

Who are fellow-servants, and whether or not the appellant was guilty of negligence, were questions for the jury, whose determination of them should not be disturbed unless upon evidence that this record does not contain.

Appellant contends that because one count of the declaration avers that appellee was familiar with the work being done, he could not rely upon the superior knowledge of Farnsworth in the method of doing it. That contention is fairly met by the further averment in the same count, that Farnsworth directed him as to the manner of removal, and refused to use a guy or tag line, but endeavored to hold the strut with his hands, whereby, etc.

We can not stop to discuss other points made by the appellant. None of them are, in our opinion, of sufficient weight to justify a reversal of the judgment, and it will therefore be affirmed.

**Chicago City Railway Company v. Rena Burrell,
Administratrix.**

1. **NEGLIGENCE**.—*Not Shown by the Evidence*.—The court holds that in this case the deceased either failed to exercise ordinary care or that his fall was occasioned by causes which the evidence did not disclose, and that negligence upon the part of the appellant was not shown.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed and judgment in this court. Opinion filed April 15, 1897.

STATEMENT OF THE CASE.

On October 4, 1891, Louis Burrell was a waiter in the cafe of the Palmer House of this city. On the evening of that day, about 7:30 o'clock P. M., he left the cafe, where he had been working all day, and took passage on a car of the defendant at State and Adams streets, going in a southerly direction on State street. Burrell lived at that time at 2702 Dearborn street, Dearborn being the first street west of State street, and his home being a couple of doors south of Twenty-seventh and Dearborn streets, and he was proceeding upon his way homeward from his work.

He seated himself on the east side of the grip-car in the second seat from the rear, at a point slightly behind and to the left of the gripman of that car. As his car approached Twenty-seventh street he arose from his seat, passed toward the back of the grip, probably to get around the rear end of the grip, and get off on the west side of the grip at the south line of Twenty-seventh street, in order to proceed to his home.

The grip-car started to slacken up as it approached the north line of Twenty-seventh street, probably for the purpose of allowing Burrell to alight.

As Burrell was thus going around the rear end of the grip, in some manner not shown by the proof, he fell from

the south bound car. He fell upon his back on the west rail of the east or north bound track of State street. He moved after he fell, and then laid still with his head toward the southeast. He moved his hand in some manner after he fell, but did not arise immediately, being apparently stunned by the fall. The south-bound car stopped at the usual place to permit passengers to alight.

At the time he fell, a north-bound grip train was approaching Twenty-seventh street. It was going at the rate of ten miles an hour, being the usual speed of a grip train, and when Burrell fell was at a distance variously estimated at from fifteen to one hundred feet from the point where he fell. Burrell fell at a point from ten to twenty feet south of the south line of Twenty-seventh street.

The gripman in charge of this train did not see Burrell until he struck the tracks in front of the north-bound car. The south-bound car stopped almost immediately after Burrell fell. Some persons on the north-bound car screamed, and the gripman, seeing Burrell, applied his brakes and released the cable, and finally brought the north-bound train to a stop as soon as possible.

Before this had transpired, however, the grip-car had struck Burrell as he lay at the point from ten to twenty feet south of the south line of Twenty-seventh street, and dragged him from where he lay almost to the north line of Twenty-seventh street, a distance estimated at from thirty to fifty feet. On the northeast corner of Twenty-seventh and State streets was a lamp post. The grip was lifted up, Burrell was taken from underneath, and he was carried to this lamp post, and set up against it. He was still conscious, was able to tell his name and where he lived. His clothes were bloody, and he was covered with mud and dirt. He had been caught under the fender of the car and dragged along the track. He was taken home in the patrol wagon, and died from his injuries the following morning.

DARROW, THOMAS & THOMPSON, attorneys for appellant.

J. WARREN PEASE, attorney for appellee; W. S. ELLIOTT, JR., of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

There was no negligence on the part of the managers of the south-bound train upon which the deceased was a passenger, and from which he fell. Nor did it appear that the gripman upon the north-bound train was negligent. He testified that he did not see the deceased until he struck the tracks in front of the car; that he then made every effort to stop his train, there is no dispute.

Whether the gripman upon the north-bound train saw the deceased as soon as he fell is immaterial. There is no evidence that this gripman was in any respect negligent, inattentive or heedless. He had no reason to expect that the deceased was about to fall or jump in front of the train; and while the deceased was at no time a trespasser, yet his sudden appearance upon the track created the duty only of using such care as was possible from such moment.

The deceased either failed to exercise ordinary care, or his fall was occasioned by causes which the evidence does not disclose. However this may be, negligence upon the part of appellant was not shown.

The jury should, as was requested, have been instructed to find for the defendant.

The judgment of the Circuit Court is reversed, and a judgment for the defendant will be here entered upon a finding of facts.

Reversed, and judgment for defendant here.

Joseph Dux et al. v. Carl John Blomstrom.

1. **MISTAKES OF LAW—*Money Paid Under, Can Not be Recovered.***—The fact that parties were mistaken as to the law, and that the apparent lien of an assessment was held to be invalid, and was never enforced, does not give a vendor the right to recover from his vendee money withheld from the contract price on account of such assessment in the absence of an agreement covering the subject.

Dux v. Blomstrom.

BILL, to enforce a vendor's lien. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and bill dismissed. Opinion filed April 15, 1897.

ROSS & TODD, attorneys for appellants.

KERR & BARR, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a bill in equity filed by the appellee to enforce a vendor's lien against certain real estate sold and conveyed by the appellee to the appellants.

The contract of purchase and sale between the parties bore date on July 20, 1892, and contained a provision as follows: "It is further mutually agreed by the parties hereto that said parties of the second part (appellants) shall pay one-half of the general taxes levied and assessed upon said premises for the year 1892; all other and prior taxes and assessments to be paid and discharged by said party of the first part" (appellee).

The contract price was \$6,800.

Whether it was known and considered as an element that entered into the contract price, by both or by either one of the parties at the time, or before the contract was made, that an assessment against the premises had been levied by the Board of West Chicago Park Commissioners for the improvement of Washington Boulevard, upon which street the premises fronted, was a matter of considerable dispute between the parties in testifying, but it is certain that when the abstract of title was furnished it was made to appear that there existed such an unpaid assessment, amounting to about \$2,800.

The bill alleged that such assessment and improvement were not in contemplation of the parties at the time of making the contract. However that may be, it was alleged by the bill, and is not materially denied, that when the abstract had been examined the appellants demanded that appellee

should pay such assessment, as, by the terms of his contract, he was bound to do, and that appellee, believing the assessment to be a valid charge against the premises, agreed to allow a part of it, to the amount of \$2,083, to be retained by appellants out of said contract price, and a due conveyance of the premises was then made by warranty deed, dated, acknowledged and recorded July 29, 1892, subject to said assessment, which was to be paid by the grantees, the appellants.

The bill further alleged that in June, 1895, the said Park Board set aside the assessment with reference to said premises, and that the said assessment thereby ceased to be a lien against the premises, and that the retention by appellants of said \$2,083, under the circumstances, amounted to a payment of that amount by appellee to appellants upon a mistake of fact with regard to said assessment, and that appellee is entitled to have the same paid back to him; that the \$2,083 so allowed constitutes a part of the purchase money which has not been paid to the appellee, and that he is entitled to a vendor's lien upon the premises therefor.

There is no dispute but that the assessment in question had been levied and confirmed before the abstract of title was furnished by appellee for examination, nor but that the judgment of confirmation thereof was reversed by the Supreme Court, and that in June, 1895, its further collection was abandoned, and thereby the premises were relieved from the lien of the assessment.

The appellants insist that the matter of boulevarding the street and the assessment therefor was talked of and considered by the parties at the time the contract was made, and that appellee represented he had paid the assessment, and that such matters constituted inducements to them to buy the property.

We understand the appellee to deny in his testimony that any such elements entered into the contract. But it plainly appears that he did, by his contract, as executed, agree to sell and convey the premises free from all such assessments, and that afterward when the abstract of title had been

examined and such assessment was shown to have been confirmed, the appellants refused to close up the contract unless he discharged the assessment or adjusted it, and that thereupon appellee agreed to allow three-quarters of the amount of the assessment to be taken out of the contract price, and to make the deed subject to the assessment.

The warranty deed then given by the appellee to the appellants recited: "This deed is given subject to all taxes and assessments levied, charged or assessed upon said premises after the year 1891, and subject to all assessments for improvements not yet made, the payment of all such taxes and assessments being assumed by the grantees herein as part of the consideration of this deed."

When the deed was made there was no mistake of fact concerning the assessment. It had been confirmed by the court and was an apparently valid lien against the premises, and its amount was known to all parties.

We do not apprehend that the fact that the parties were mistaken as to the law, and that two or three years later the assessment was held to be invalid, could give appellee a right to the relief he asked.

The fact that the apparent lien of the assessment was never enforced, and became incapable of enforcement, did not give the appellee a right to obtain back from appellants the money withheld from the contract price in the absence of any agreement covering the subject.

Supposing that, instead of it having been an assessment lien, it had been the lien of an ordinary judgment for which the appellee was not personally liable. Would it be contended in such case, and with no agreement concerning it, that if the judgment lien should not be enforced and should subsequently become barred by the statute, or if the grantees in the deed should compromise and settle the judgment for less than its face, the grantees would become liable to the grantor for all they had been benefited by such a barring or compromise over what had been deducted from the price of the land?

Here the appellee was not personally liable for the assess-

ment, and it could make no difference to him whether appellants paid it or not. He conveyed the land absolutely to the appellants, subject to the assessment, giving to them in effect an agreed part of the amount of the assessment because of it. They did not agree with him to pay the assessment. Even if the clause in the deed reciting that the conveyance was made subject to the assessment, and that appellants had "assumed" to pay the same as part of the consideration of the conveyance, might be held to obligate appellants, either at law or in equity, to pay the assessment to whoever could claim its payment from appellee, yet as appellee was not, when he owned the property, or at any other time, under any personal obligation, either legally or morally, to pay the assessment to anybody, and never has paid it, he has no standing to claim anything because appellants did not pay it.

If appellants had agreed with appellee, expressly or impliedly, to pay back to him whatever they might save from the assessment, a different question would exist, but there was no such agreement ever made. Nor is there, under the facts, any room to assume that the money was deducted for the express purpose of paying the assessment for appellee, whereby a trust relationship arose. It was simply a deduction of so much money because of the apparent lien upon the land, which appellants were at liberty to discharge or not.

Appellants have paid everything they ever agreed to pay to or for appellee, and we are unable to see from a careful consideration of the evidence and the law applicable to it, any more reason to require appellants to account to appellee in the respect demanded, than for any other profit or advantage they may have made out of the transaction.

The decree of the Superior Court was without justification. The bill ought to have been dismissed for want of equity, and such is the order that will be entered here.

Decree reversed and bill dismissed for want of equity.

West Chicago Street Railroad Company v. Norma Boeker.

1. **VERDICTS**—*Must be Sustained by the Evidence.*—The court discusses the evidence, and holds that it does not sustain the verdict, and that the judgment must be reversed.

2. **NEGLIGENCE**—*Showing Necessary, in Suit Based on.*—With the abrogation of the doctrine of comparative negligence, the old law is reinstated, and a party seeking to recover damages for negligence must show that his own negligence did not concur with that of the other party in producing the injury.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1897. Reversed with finding of facts. Opinion filed April 15, 1897. Rehearing denied. Opinion filed May 6, 1897.

ALEXANDER SULLIVAN, attorney for appellant; EDWARD J. McARDLE, of counsel.

JAMES B. McCracken and ALBERT M. Cross, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant for personal injury received by reason of a collision between a cable car of the appellant and a phaeton drawn by two ponies which she was driving on Sunday evening, October 16, 1892.

The hour is not definitely fixed by the evidence, but it is pretty certain that it was after sunset and getting dark. The headlight on the car was lighted. She was driving south on California avenue when she saw the car going east on Madison street. Those streets cross at right angles. On Madison street was a double-track railway, and the car was on the south track. When the car was about one hundred and fifty feet west of her line of travel, she stopped with the heads of her ponies at the north rail of the north track.

The gripman of the cable car stopped the car at the same time, because he heard the rattle of the phaeton approach-

ing. Then each seeing that the other had stopped, both started again, and the car caught the hind wheel of the phaeton, causing the injury complained of.

It is only because the appellant is a railroad that it can be pretended that the collision was without contributory negligence on her part which bars a recovery. *L. S. & M. S. Ry. v. Hessions*, 150 Ill. 546; *N. C. S. R. R. v. Eldridge*, 151 Ill. 542.

She testified that when she saw that the car had slackened up she started the ponies up—"just let the lines go and kind of started them—spoke to them and started to cross"—"was watching the horses, and didn't look at the car; paid no attention as to how it was coming, what rate of speed it was coming, or how near to me it had arrived."

Her cousin, a young man riding with her, testified: "When our horses' heads were north of the north track I had the opportunity to look both ways and see what was going on, and did so; yet I told my cousin to drive ahead. I thought I could make it, because I saw the car slack up when I told the young lady to drive across there; I knew that was a new team and was afraid of them; was afraid they might get scared at the car, but they did not, and I told her to go across, because I thought there was sufficient time to get over."

The distance each had to travel demonstrates that the car must have started before the phaeton did. The occupants of the phaeton could see the movement of the car, for it was lighted.

The phaeton could be but dimly seen in the obscurity.

The judgment is reversed and the cause is not remanded.

A finding of facts will be made and entered.

Reversed and finding of facts made and entered.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

ON PETITION FOR REHEARING.

It is hard that a young woman who has sustained severe injury by a force controlled by a corporation should alone suffer, even though she negligently went in the way of that

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force. While the doctrine of comparative negligence was in force in this State, some color of a justification of such a verdict as was here rendered could be presented; but with the abrogation of that doctrine—as shown by the cases cited in the original opinion—the old law is reinstated, that a party seeking to recover damages for negligence, must show that his (or her) own negligence, has not concurred with that of the other party in producing the injury. *Aurora Branch R. R. v. Grimes*, 13 Ill. 535.

There is no evidence that the injury to the appellee was willfully or wantonly inflicted; it was simply the result of the appellee and the gripman each assuming that the other would wait at the crossing; and had the appellee exercised ordinary care, she would have seen, before she started, that the gripman had not waited, but had already started.

The original brief of the appellee says that at the time both stopped the gripman could not see the appellee. As to the presumed degree of light at 6 P. M., October 16th, it must be remembered that Chicago time, since railway time has been adopted, is nearly ten minutes slow, and 6 P. M. was more than fifty minutes after sunset.

The petition is denied.

This disposition of this case is no bar to another suit. *Chicago F. & B. Co. v. Rose*, No. 6836, filed March 8, 1897.

Whatever the inference from *Borg v. C., R. I. & P. Ry.*, 162 Ill. 348, the question of a bar to another suit was not in that case, and the statute and uniform law of centuries are of higher authority than an inference.

James P. Monahan v. Michael Lovece and Kittie Lovece.

1. *CONSIDERATION—Non-Performance of Agreement as Failure of.*—The non-performance of an agreement forming the consideration of a note is not a failure of consideration unless the agreement be rescinded.

Bill to Cancel Notes.—Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded, with directions. Opinion filed April 15, 1897.

STATEMENT OF THE CASE.

This was a bill filed by the appellees to cancel certain notes aggregating \$450, on the ground that the consideration thereof had failed. The appellant herein, defendant below, answered the bill and filed his cross-bill to foreclose a chattel mortgage securing the notes. The court entered a decree ordering that the notes be surrendered for cancellation.

MASTERSON & HAFT, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It appears from the complainant's bill that they purchased from appellant the furniture, fixtures, contents and good will of a saloon at 507 South Clark street, Chicago. That they gave therefor three vacant lots in Indiana, at a valuation of three hundred dollars, and promissory notes of the complainants for the sum of \$1,200, making in all \$1,500, securing the same by a chattel mortgage on the contents of said saloon.

That the appellant, when said notes and mortgage were executed, verbally agreed that he would go out of the saloon business in the neighborhood of 507 South Clark street, and would at no time engage in business anywhere in that vicinity; that he was going to move to New York, and that if he should at any time return to Chicago and there enter into the saloon business, he would pay the complainants for the said saloon, furniture, fixtures, etc., three times the amount the complainants had paid him.

That the leading consideration for the purchase of said saloon was this promise by appellant; that in violation thereof he has returned to Chicago and has gone into the saloon business at 515 South Clark street, and thereby so injured the business of complainants that the receipts of their said saloon have dwindled from twenty to five dollars

Monahan v. Lovece.

per day. That the furniture, fixtures and contents of said saloon purchased by complainants were not worth, when bought as aforesaid, over \$500, and are not now of a greater value than that sum. That the complainants have paid all of said notes except certain ones amounting to \$450, the consideration of which, complainants allege, has by reason of appellant's said violation of his promise, wholly failed. Complainants therefore ask that said notes be canceled; but do not offer to rescind the contract of sale.

Conceding that the evidence sustains the allegations of the complainants' bill as to a promise by appellant not to engage in the saloon business in the vicinity of South Clark street, are the complainants entitled to a decree for the cancellation of the unpaid notes? There is neither allegation nor evidence that the entire consideration of these, or any particular notes, was a promise by appellant not to engage in the saloon business on South Clark street.

The sale of the saloon property, business and good will, was a consideration for each of the notes.

There has clearly not been, as alleged, a total failure of consideration of the unpaid notes. Nor has there been a partial failure.

The bill alleges that a part of the consideration for the notes was the verbal promise by appellant not to engage in the saloon business in the vicinity of South Clark street, and that if he should do so, that he would pay to the complainants for the said saloon sold to them three times what they had paid to him therefor.

The promise is alleged to have been a consideration; not the fulfillment thereof; and, as alleged, the sum to be paid by appellant, if he violated this undertaking, was fixed.

The promises to pay the notes, made by the complainants and the promise made by appellant, are independent agreements.

If complainants do not pay the notes appellant can not for that reason rescind the sale of the saloon.

Complaints have received and are yet in possession of the

contents of the saloon, and have not offered to surrender anything received by them.

The promises of each being independent, mutual agreements, appellant has his remedy on the contract running to him, and complainants on the promise running to them. *Clough v. Baker*, 43 N. H. 254, is much like the present case.

The non-performance of an agreement forming the consideration of a note is not a failure of consideration unless the agreement be rescinded. 2 *Randolph on Commc'l Paper*, Sec. 553; *Jones v. Council Bluffs Bank*, 34 Ill. 313-319; *Rhodus v. Welz*, 87 Ind. 1; *Simpson Centenary College v. Bryan*, 50 Ia. 293; *Morrison v. Jewell*, 34 Maine, 146; *Moggridge v. Jones*, 14 East, 486; *Wilson v. Dean*, 74 N. Y. 531.

The decree of the Superior Court is reversed, and the cause remanded, with directions to the Superior Court to dismiss appellees' bill for want of equity, and to enter a decree in accordance with the prayer of the cross-bill filed by appellant. Reversed and remanded with directions.

70	72
173	223

70	72
86	452

70	72
104	1176

Joseph A. Shepard v. John W. Mills, Joseph C. Berry and Thomas Berry.

1. **COMMON COUNTS**—*When Recovery May Be Had Under*.—Where, under a special contract, nothing remains to be done but to pay what is due under the agreement, a recovery can be had under the common counts.

2. **CONTRACTS**—*Waiver of Conditions of*.—A condition in a contract of sale as to the passing of title, being for the benefit of the vendor, can be waived by him.

3. **SAME**—*Slight Defects in the Performance of*.—Slight defects in work, caused by inadvertence or unintentional omissions, are not necessarily in the way of recovery of the contract price, less the amount by way of damages requisite to indemnify the owner for the expense of conforming the work to that for which he contracted.

4. **SAME**—*Slight Defects in the Performance of*—*The Rule Applied*.—Under a contract to put in a heating apparatus with certain stubs, etc.,

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if there has been no willful departure from the terms of the contract, or omission in essential points, and the laborer has honestly and faithfully performed the contract in all its material and substantial particulars, he will not be held to have forfeited his right to remuneration by reason of mere technical, inadvertent or unimportant omissions or defects. The law imposes no such liability and enforces no such penalty.

5. *PLEAS—May Be Read to the Jury.*—While what is stated in one unverified plea is not evidence in refutation or support of another plea, nevertheless, it is proper to read pleas to the jury for the purpose of informing them what the issues are which they are to try.

Assumpsit, for work and material used in constructing a heating apparatus. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed April 15, 1897.

F. W. BECKER, attorneys for appellant.

CARL R. LATHAM and ROBERT N. HOLT, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of *assumpsit* brought to recover an amount claimed to be due for putting a heating apparatus in the premises of appellant. There was a finding and judgment for the plaintiff.

Where, under a special contract, nothing remains to be done but to pay what is due under the agreement, a recovery can be had under the common counts. *Mayer v. Mitchell*, 59 Ill. App. 26; *Gottschalk v. Smith*, 54 Ill. App. 341; 1 Chitty's Pl. 350, note f.

Whether the contract under consideration had been performed by appellees, as well as whether title to the apparatus had passed, were questions which, so far as they depended upon facts, have been found against the contention of appellant.

That the condition as to the passing of title, being for the benefit of appellees, the vendors, could be waived by appellees is apparent.

The court, at the instance of the plaintiff, gave the following instruction:

"3. The court instructs the jury that if they believe from the evidence that the plaintiffs erected and put in the defendant's store building a heating apparatus in accordance with the terms of the contract offered in evidence, and performed their side of said contract in all substantial respects, and that said apparatus heated the rooms and apartments to be heated to the required degree of temperature, the defendant then became liable to pay the amount specified in said contract to be paid for said plant, less whatever damages, if any, the evidence may show the defendant to have sustained by reason of any breach (if the evidence shows such breach) of the guarantee in said contract, so far as such damages, if any, are claimed and alleged in defendant's plea of set-off."

It is urged that this instruction is erroneous in that it allowed a recovery if the plaintiffs had performed "their side of the contract in all substantial respects." In *Estep v. Fenton*, 66 Ill. 467; *Taylor v. Beck*, 13 Ill. 376, and *Keeler v. Herr*, 157 Ill. 57, such instructions were held to have been improperly given.

It is manifest that upon a promise to pay one thousand dollars, or sell one thousand bushels of corn or "my bay horse Jim," or "all the sheep on my farm," there must be an exact fulfillment, because the contract is such an one that it is easy not only to exactly fulfill, but easy to ascertain whether there has been such performance.

In a contract to build a house according to plans and specifications, or to put in a heating apparatus with certain stoves, radiators, coils, pipes, plates, valves, heaters, cocks, tanks, tools, etc., guaranteed with certain care and use to heat a certain space, if there has been no willful departure from the terms of the contract, or omission in essential points, and the laborer has honestly and faithfully performed the contract in all its material and substantial particulars, he will not be held to have forfeited his right to remuneration by reason of mere technical, inadvertent or unimportant omissions or defects. The law imposes no such liability and enforces no such penalty. *Glacius v. Black*, 50 N. Y. 145; *Crouch v. Gutman*, 134 Id. 45.

Slight defects, caused by inadvertence or unintentional omissions are not necessarily in the way of recovery of the contract price, less the amount, by way of damages, requisite to indemnify the owner for the expense of conforming the work to that for which he contracted. *Linch v. Paris Lumber Co.*, 80 Tex. 23; *Flaherty v. Minor*, 123 N. Y. 382; *Gallagher v. Sharpless*, 134 Pa. St. 134; *Moore v. Carter*, 146; *Id.* 492; *Leeds v. Little*, 42 Minn. 414; *Ætna Iron Works v. Kossuth Co.*, 79 Ia. 40; *Keeler v. Kerr*, 157 Ill. 57.

It is true, as urged by the defendant, that what is stated in one unverified plea is not evidence in refutation or support of another plea; nevertheless, it is not improper to read pleas to the jury for the purpose of informing them what the issues are which they are to try.

We do not think that the statements by appellant, contained in letters to appellee as to taking out the plant, amounted to a refusal to accept the apparatus. Each was conditioned upon a performance of the agreement to heat or to put in additional radiation. Appellees expressed themselves as able and ready to fulfill their undertaking, gave attention to the matter, and have been found by the jury to have performed their contract.

We find no reversible error in giving or refusing instructions.

The judgment of the Superior Court is affirmed.

MR. PRESIDING JUSTICE SHEPARD.

I concur, upon the ground that there was sufficient evidence in the case to justify the finding that appellant accepted the heating apparatus, and he should have shown, if he could, what damages, if any, he suffered from a breach of the appellees' contract of warranty. Of such damages I find no sufficient proof to make them capable of measurement.

70	78
100	1552

Edward S. Dreyer v. Helen L. Kadish et al., Adm'x, etc.

1. **GUARANTY**—*Consideration for, Must be Shown.*—In a suit against a guarantor of a promissory note where it appears that at the time the plaintiff acquired the note the guarantor was in no manner liable upon it, the burden is upon the plaintiff to show a consideration for a subsequent guaranty.

2. **VERDICTS**—*Contrary to the Evidence.*—The court reviews the evidence in this case and holds that there is no evidence to show a consideration for the guaranty sued on, and that the verdict and judgment are manifestly contrary to the evidence.

Assumpsit, on a guaranty of a promissory note. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed March 29, 1897.

LACKNER & BUTZ, attorneys for appellant.

GEORGE B. MERRICK, attorney for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Judgment for \$14,255.53 was recovered by the defendants in error against the plaintiff in error, in a suit brought by the former against the latter upon his alleged guaranty of a promissory note for \$10,000, made by the Chicago Garbage Reduction Company, dated April 1, 1890, payable in one year to the order of Albert D. Langworthy.

The note was one of a series of like instruments, except in amounts, aggregating \$16,000, by the same maker to the same payee, all secured by a chattel mortgage upon the plant of the maker, and seem to have been made by the corporation maker for the purpose of raising money from its stockholders to enable it to continue in business, and to pay its debts for about the same amount then held against it by the firm of E. S. Dreyer & Company, of which plaintiff in error was a member. Leopold Kadish, the intestate of defendants in error, and the plaintiff in error were among

Dreyer v. Kadish.

its stockholders, and the note in question represented the relative share of the notes that Kadish had said he would take.

The payee of the notes was not personally interested in any of the transactions, but was a clerk for E. S. Dreyer & Company, and was a mere instrument to hold and distribute the notes among the stockholders who were to pay for them, and the notes were indorsed by him without recourse. Above his indorsement on the back of the note in suit, was indorsed the name of the plaintiff in error, but when it was put there and for what purpose, and if not put there until after Kadish had received and become the owner of it, whether for a consideration or not, are the questions in the case.

The declaration alleged the making of the note in the lifetime of Kadish, and "that Langworthy, the payee, afterward, and before the payment of any part of the note, and before it became due, indorsed the said note without recourse to Leopold P. Kadish or order, and delivered the same to him; that before the delivery of the note to Kadish, in consideration that he would accept and receive the same of the Chicago Garbage Reduction Company, and for a valuable consideration to him paid by Kadish, the defendant, by his indorsement in writing upon the said note, guaranteed the payment thereof according to the tenor and effect of the note, if the Chicago Garbage Reduction Company should not pay the same; that Kadish, relying upon the indorsement, accepted the note, and although the note has long since been due, the said company has not paid same or any part thereof; by means whereof the defendant became liable to pay to the plaintiff the sum of money in the note specified."

The only plea was the general issue.

It was clearly proved, that Kadish paid for the note, and that it was delivered to him, indorsed by the payee, before it was indorsed by the plaintiff in error, and the declaration, as quoted, probably admits a part of such facts.

There was no attempt to contradict the testimony of Mr.

Berger, a member of the firm of E. S. Dréyer & Company, that at the time, April 4, 1893, when he delivered the note, already indorsed by the payee, to Kadish, the latter paid \$10,000 for the note, and that Mr. Dreyer's name was not then indorsed on the note. A week or two afterward he again saw the note in Kadish's hands, and Mr. Dreyer's name was not then upon it. Langworthy, the payee, testified that Dreyer's name was not on the note when he indorsed it.

Prussing, the president of the corporation, whose note it was, testified that on April 4, the day on which Mr. Berger delivered the note to Kadish, he saw the note in Kadish's hands and that Dreyer's name was not on it, although Langworthy's was. And to such testimony there was no contradiction.

It being thus clearly proved that at the time Kadish acquired the note Dreyer was in no manner liable upon it, it devolved upon defendants in error to show that for his subsequent guaranty a consideration was paid. This was not done. We have examined the record with the greatest care to discover, if we might, some evidence of such a consideration, but without success.

Although it might be that a previous agreement with Kadish by Dreyer, to guarantee the note if Kadish would loan the money to the corporation, would support a guaranty made after Kadish had acquired the note, the evidence does not sustain that there was any such agreement.

A witness of the highest respectability, who is one of the defendants in error, testified to acknowledgments made by Dreyer of his liability as guarantor of the note, and of his assurances that he would pay the note when due, but such evidence was not at all inconsistent with the fact that his guaranty was made without consideration, nor did it imply that there was any previous agreement for his guaranty.

Dreyer may have supposed he was liable to pay the note, and when, at least, some of such assurances concerning his liability were made, may have believed that the money to

Commercial Nat. Bank v. Stoddard.

pay the note would be realized upon a sale of the mortgaged plant, but he was not thereby estopped from making all lawful defenses when sued upon his guaranty.

Although it is contended that it was the province of the jury to settle the question, when Dreyer's name was put upon the note, we are not at liberty to sustain a judgment which is so manifestly against the evidence as in this case.

The judgment was wrong, and must be reversed, and the cause remanded.

Commercial National Bank et al. v. Horace H. Stoddard.

1. **COURTS—Power of, Over Their Own Process.**—If it be shown that it is inequitable to allow the enforcement of an execution upon a particular levy, the court from which the execution issued may quash the levy. Courts will recall their process and quash the same when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced.

2. **EQUITY—Neglect to Pursue Remedy at Law.**—If a party neglects to pursue his remedy at law, he can not come into equity for relief.

Bill for an Injunction.—Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded, with directions. Opinion filed May 6, 1897.

SLEEPER, McCORDIC & BARBOUR, attorneys for appellants.

W. N. GEMMILL and J. W. MERRIAM, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The history of events of which the sequel is this bill in chancery, on which March 19, 1897, the Superior Court entered an interlocutory order for an injunction restraining the appellant from prosecuting an action upon a replevin bond given by the appellee, may be found narrated in *Stoddard v. Gilbert*, 62 Ill. App. 70, affirmed in 163 Ill. 131, and reference is made to that history to economize labor.

After the defeat there shown, and suit commenced upon the bond, the appellee filed this bill, setting out many circumstances to show what a hardship it will be to him to be bound by the terms of his bond, and likewise circumstances from which he deduces the conclusion that it was inequitable for the appellant to enforce the execution, from the levy upon which the appellee replevied.

If that conclusion be correct, the appellee, instead of his replevin, might have successfully applied to the court from which the execution issued, to quash the levy, for "Courts will recall their process and quash the same, when it is shown that it would be illegal or inequitable to permit its further use, and to allow it to be enforced." *Sandburg v. Papineau*, 81 Ill. 446.

And if the party neglected his remedy at law, he may not come into equity for relief. *Chittenden v. Rogers*, 42 Ill. 95; *Harding v. Hawkins*, 141 Ill. 572.

We are not called upon to say whether there ever was any reason, legal or equitable, for quashing, or restraining the use of the execution, nor whether, if there was, it can be made available in defense of the suit on the bond, but only to say that there is no ground for enjoining the prosecution of that suit.

The order granting the injunction is reversed and the cause remanded, with directions to dissolve the injunction.

Dexter E. Kenyon v. Roxanna Hampton.

1. **BURDEN OF PROOF**—*In Upon Plaintiff*.—A plaintiff must make out his or her case by a preponderance of the evidence, and in this case the court holds that there was a clear failure in that regard and that the judgment in plaintiff's favor must be reversed.

Assumpsit, for a wrongful discharge. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTTILL, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

Kenyon v. Hampton.

JESSE HOLDOM, attorney for appellant.

M. L. THACKABERRY, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action brought by the appellee for the breach of an alleged verbal contract of employment of her by the appellant, for the term of one year from March 5, 1894, at a weekly salary of \$25, and resulted in a verdict and judgment for \$1,150 in favor of the appellee.

The alleged breach was the subject of a special count, and consisted in a discharge of the appellee at the end of six weeks service, without cause.

Besides denying the contract as alleged, by a plea of the general issue, the appellant pleaded specially that the discharge was for cause.

There was no dispute as to the rate of wages, nor but that appellee was paid in full for the time she worked. Whether the term of employment was for a full year or for the "season" (which lasted until about the first of July), if appellee's services were satisfactory, and as to whether her discharge was justifiable, were the contentions.

Appellee's testimony furnished the only support to her case as to what the contract was. Her testimony was explicit and unequivocal that she was hired for the full term of one year.

Opposed to her testimony was that of the appellant, who testified with equal positiveness that the hiring was for the season only, and not for that long unless her services proved to be satisfactory; and his testimony was supported by that of Mr. Otto Young, the manager of The Fair, in one of the departments of which appellant carried on his business, who testified that appellee came to him with complaints against appellant, and talked about suing appellant for her wages up to July 1st, and told him, in response to his inquiry as to her term of employment, that she was employed for the season ending about the middle of June or first of July.

To another witness appellee stated her contract with appellant as being entirely different from either contention now appearing. If it be said that there were proved circumstances in the case that tended to support appellee's claim, it may be answered that there were as many other proved circumstances that tended quite as strongly to support appellant's version of the contract.

It is a familiar rule that a plaintiff must make out his or her case by a preponderance of the evidence.

In this case there was a clear failure by the appellee in such regard, and we are bound to hold that the verdict was so manifestly against the preponderance of the evidence as to require us to reverse the judgment. *Peaselee v. Glass*, 61 Ill. 94.

The appellee does not claim under any other contract than the one for a full year, as set forth in her declaration, and having failed to sustain the existence of any such contract, she had no right to any recovery for its breach, no matter whether she was rightfully or wrongfully discharged. Her whole claim is for the breach of a contract that she failed to prove.

The judgment is reversed and the cause remanded.

Nathaniel C. Foster v. Frank Sayre Osborne.

1. *CONSIDERATION—When Proof of Is Not Required.*—A guaranty under seal expressed on its face that it was made for value received. *Held*, that no extraneous proof of a consideration was needed.

2. *PLEADING—Allegations Not Denied Considered as Admitted.*—In a suit on a guaranty where the breach alleged is not denied by the pleas it is considered as admitted, and proof of such breach is not required.

Covenant, on a guaranty. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

S. W. McCASLIN, attorney for appellant.

ROBERT F. PETTIBONE, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

There was much pleading in this case although the issues were simple.

The action was covenant by the lessor against the guarantor of a lease.

The lease was by appellee to Charles I. and Anna C. Wickersham, dated February 1, 1891.

Appellant's guaranty upon the back of the lease was as follows:

"For value received, I hereby guarantee the payment of the rent and the performance of the covenants by the party of the second part in the within lease, covenanted and agreed in manner and form as in said lease provided.

Witness my hand and seal this sixth day of February, A. D. 1891.

N. C. FOSTER. [SEAL.]"

In January, 1893, the lessees, with the consent of the lessor, assigned the lease to Mary L. Greene, upon the condition, however, that the Wickershams should remain liable, etc., and the alleged breach of covenant was non-payment of rent from May 1, 1893, to April 30, 1894.

The evidence furnishes but very little matter for controversy. Although appellant may have been desirous, at the time the lease was assigned, to become freed from his liability as guarantor, it was not done, and he took chattel mortgage security from Mrs. Greene to secure him that she would keep him safe.

Any claim that, as a matter of law, appellant was guarantor only for Wickershams is satisfactorily answered in *Farnham v. Monroe*, 35 Ill. App. 114; and *Dietz v. Schmidt*, 27 Ill. App. 114. No one of the pleas that were left to go to trial upon denied the alleged breach, and the breach therefore stood as admitted, and proof of the breach was not required, and the jury was properly so instructed.

It is claimed to have been error by the court to modify

an instruction asked by the appellant that if the lease and guaranty were executed at different dates and as independent transactions, and that appellant received no consideration for the guaranty, he should be found not guilty, by adding that, as a matter of law, a consideration passing to the principal was sufficient to support the guaranty without any other consideration passing to the guarantor.

It will be observed that the guaranty expressed on its face that it was made for value received, and that it was under seal. No extraneous proof that there was a consideration paid was therefore needed, and the instruction was not wrong.

We need not comment upon the objections that are urged because of the refusal of other instructions asked by appellant. None of them are tenable.

Nor need we take time to consider the arguments concerning the action of the court upon appellant's numerous pleas. Of the seventeen pleas that he filed, those that were left for him to go to trial upon presented every material defense that was open to him, and a full consideration of all the evidence shows very satisfactorily that the judgment was right and ought to be affirmed, and it is so ordered. Affirmed.

70 84
170* 383

Calumet Electric Street Railway Company v. John P. Christenson.

1. **NEGLIGENCE—*Driving on Street Car Track.***—The court can not say, under the circumstances of this case, that it was negligence to drive a wagon on the street car track in the same direction that a car would travel.

2. **VERDICTS—*On Questions of Fact Conclusive.***—The finding of the jury in this case is a conclusion on a question of fact which the court may not set aside.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1897. **Affirmed.** Opinion filed May 6, 1897.

Calumet Electric Street Ry. Co. v. Christenson.

MANN, HAYES & MILLER, attorneys for appellant; JUDSON F. GOING, of counsel.

B. F. CHASE and F. H. NOVAK, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

November 8, 1893, about six o'clock P. M., the evening being very dark and foggy, the appellee was riding in a wagon loaded with furniture, the wagon going in the track of the appellant upon a street of Chicago, so far from the business centre that of any other city it would be in the outskirts, or outside, of the city.

The street itself was of that character that a wagon so loaded, traveling in the dark, must go in the car track to avoid being wrecked.

A car of the appellant running, when the wagon was first seen ten feet off by the motorman, at a speed of seven miles an hour, ran into the wagon and the appellee sustained personal injuries for which in this suit he has recovered \$1,350.

A court can not say that it was negligence to drive the wagon in the car track, in the same direction that a car would travel, though the night was dark.

If the jury found that the driver might rightly assume that under such circumstances the car, if one was following, would be run at a speed so slow that the motorman would be able to stop it, and would stop it, before striking anything made visible to him by the headlight, the court can not say that the jury was wrong on that question of fact; that is, whether such assumption was negligence. And the finding of the jury that not having the car so under control was negligence by the appellant, is also a conclusion on matter of fact which the court may not set aside. The criticism upon an instruction is answered by the remarks of the Supreme Court on "hypercriticism," in *L. S. & M. S. Ry. v. Johnsen*, 135 Ill. 641; commented upon in *Springfield City Ry. v. Clark*, 51 Ill. App. 626.

The damages do not seem excessive. The judgment is affirmed.

Canute R. Matson, for Use, etc., v. William Ripley et al.

1. OWNERSHIP—*A Legal Conclusion from Facts Shown.*—Ownership is not a fact, but is a legal conclusion to be drawn by the court from facts to be found by the jury, and a jury should not be left to determine what facts are necessary to constitute ownership.

2. QUESTIONS OF LAW—*Should Not be Submitted to the Jury.*—Where the conclusion is one of law from facts to be found, the jury are to find the facts and the court to state the conclusion, or the law, and to submit mixed questions of law and fact to the jury is error.

Debt, on a replevin bond. Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellants.

R. L. TATHAM, attorney for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of debt instituted by the appellant upon a replevin bond given to the appellant, as sheriff, etc., by the appellees, and a recovery of only nominal damages being had, this appeal has followed.

One of the appellees, Durgin, was surety on the bond, and we will therefore speak only of Ripley & Son as being the appellees.

Ripley & Son were lumber dealers in Chicago, and bought of Hibbard & Company, lumber manufacturers at Masonville, Michigan, a large quantity of pine and cedar logs, etc., for which bills of sale were executed and delivered, which recited that an aggregate of \$21,000 had been paid as part payment by Ripley & Son. Such bills of sale were dated in the months of March and April, 1889, and described the property as lying in three certain rivers, "and being marked on the end with the letter H."

Matson v. Ripley.

We presume, although we do not find it to be so expressly stated, that the logs were to be manufactured into lumber by Hibbard & Company. Whether the vessel load of lumber that was the subject of the replevin suit was cut from such logs, was one of the principal questions in the case.

It appears that during the season more or less lumber was delivered by Hibbard & Company to vessels sent for it by Ripley & Son, and that in October the schooner Dunham was sent by Ripley & Son for another load.

The water at Masonville being shallow, the lumber was required to be taken out from Hibbard & Company's docks to the schooner by a scow.

The lumber in question had been brought out on a scow that lay alongside the schooner, and some ten or fifteen thousand feet of it loaded, when it was replevied by one Mason, who claimed it for stumpage. His claim was settled by Hibbard & Company, and the replevin writ released, and the loading proceeded.

On a day following, when all the lumber was either on the schooner or on the scow alongside, an attachment writ at the suit of Oliver, one of the parties for whose use the sheriff has sued in this case, against Hibbard & Company, was levied upon it.

Oliver was not to be easily settled with, and before the schooner was permitted to proceed with her load, Hibbard & Company gave to him a bill of sale of all the lumber, consisting of 100,000 feet, for an expressed consideration of \$900, and the master of the schooner receipted for it to him for delivery to Kellogg, Ducey & McAuley, of Chicago, at a specified rate of freight. The schooner then set sail for Chicago, and upon arrival here the lumber was replevied by Ripley & Son, as being their property. This last replevin suit was, a year afterward, dismissed on the motion of Ripley & Son, and the suit at bar was brought by the sheriff for the use of Kellogg, Ducey & McAuley and the said Oliver, upon the replevin bond.

Had the jury been properly instructed we would proceed

to discuss the law applicable to the facts we have stated, and some other facts in the case that were material to the issue, but as the case must be tried over, under proper instructions to the jury, we consider that we should refrain from expressing our opinion upon the facts now before us, and the law applicable thereto.

The main question at the trial was, were Ripley & Son entitled to the possession of the lumber at the time their replevin suit was begun? That was a mixed question of law and fact. It is always for the court alone to declare what the law is as applicable to the facts of a case, which only are to be found by the jury.

At the instance of the appellees the court instructed the jury as follows:

"(2.) The jury are instructed that if they find from the evidence that at the time of the commencement of the replevin suit referred to in this case, to wit, October 21, 1889, William R. Ripley and Bradford W. Ripley, two of the defendants in this suit, were the owners of the lumber then on board the vessel William H. Dunham, and replevied by them in said proceeding, then the jury should find for the plaintiffs in this case, and assess the plaintiffs' damages at the sum of one cent, and no more, said plaintiffs under such circumstances being only entitled to nominal damages."

Ownership is not a fact, but is a legal conclusion to be drawn by the court from facts to be found by the jury. The jury should not have been left to determine what facts were necessary to constitute ownership, as was clearly done by the instruction, and thus leave to them the determination of a question of law.

"Where the conclusion is one of law, from facts to be found, the jury are to find the facts and the court to state the conclusion, or the law, and to submit mixed questions of law and fact to the jury is error." *Charles v. Leshner*, 20 Ill. App. 36; *Mitchell v. Town of Fond du Lac*, 61 Ill. 174.

The third of appellees' instructions points out three different states of fact by which, if found, the ownership and right of possession would, as matter of law, have been ac-

Dobson v. More.

quired to the lumber by appellees, and has a slight tendency to cure the error of the quoted instruction, but we are wholly unable to say that either state of fact so indicated was found by the jury. It is quite as likely that the jury drew their conclusion of ownership from a set of facts not material to the issue, as the instruction permitted them to do. We can not, therefore, regard that instruction as curing the vice of the quoted one.

There are defects, although perhaps not vital, in some other of appellees' instructions, but they may easily be seen and obviated at another trial, and we will not take space to comment upon them.

With considerable regret that it is necessary to impose another trial of the case upon the parties for an error that could have been easily avoided, we reverse the judgment and remand the cause for the error pointed out.

70	89
171	271

John Dobson and James Dobson v. C. E. More, Assignee, etc.

1. *EXECUTIONS—Levy of, on Property in Hands of Fraudulent Grantee.*—The creditor of a fraudulent grantor may levy upon only such property of the fraudulent grantee as he is shown to have received from the grantor.

Petition, in assignment proceedings. Appeal from the County Court of Cook County; the Hon. ORRIN N. CARTER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

L. S. HODGES, and DENT & WHITMAN, attorneys for appellants; L. W. BARRINGER, of counsel.

BULKLEY, GRAY & MORE, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. The appellee is the assignee of the Wilson & Bayless

Company, a corporation, administering the assets under the direction of the County Court.

The company was incorporated in the fall of 1888—the certificate being recorded October 8, 1888.

The business in which it engaged had, before the incorporation, been conducted by George Wilson, Jr., and Theodore P. Bayless, under the firm name of Wilson & Bayless; and it may be conceded that the purpose in incorporating was to put the stock in trade of the firm into the possession of the corporation, out of the reach of the creditors of the firm—to hinder, if not to defraud them.

March 11, 1889, the appellants took judgment against the members of the firm upon a debt which existed before the incorporation, and levied upon goods in the possession of, and claimed by, the corporation. By arrangement, the goods were surrendered by the sheriff to the assignee without prejudice to any rights acquired by the levy.

Now if the case showed—what we have sought in vain to find, that the identical goods levied upon, or any of them, had ever been the property of the firm—were in the stock in trade transferred by the firm to the corporation—then the question of fraud in that transfer could be raised. But there is no proof, nor presumption, that goods in the possession of, and claimed as its own by the corporation in March, 1889, came to its possession from the firm in October, 1888, and it is not the law that the creditor of a fraudulent grantor may levy upon property of the fraudulent grantee which he did not get from that grantor.

What is herein stated as to the judgment, execution and levy is taken from recitals in petitions, answers, and orders in the County Court which the parties tacitly assume to be true.

The judgment, execution and return thereon were offered in evidence by the appellants, but rejected by the court, to which the appellants excepted, but do not allude to in their brief. In all the recitals alluded to, and in all the evidence, no one article is specified as included in the levy.

From the testimony of Wilson there is a vague inference

C. & E. I. R. R. Co. v. Driscoll.

that carpets—without more words, carpets—which had belonged to the firm were levied upon.

A judgment may not be reversed upon such an inference. The judgment is affirmed.

Chicago & Eastern Illinois R. R. Co. v. Clara C. Driscoll, Adm'x, etc.

70	91
176s	330
70	91
\$97	669
98	59
\$176s	330
70	91
\$107	615

1. **RAILROADS—Care Required of, As to Condition and Place of Cars.**—A railroad company is bound to exercise reasonable diligence to see that its cars are in such condition and place that its employes shall not be exposed to unnecessary danger in working about them.

2. **MASTER AND SERVANT—Right of Servant to Presume that Master Has Done His Duty.**—A servant has a right to presume that his master has done his duty, and that cars about which he (the servant) is required to work are in such condition and place as not to expose him to unnecessary danger.

3. **SAME—Duty to Furnish Safe Machinery Can Not Be Delegated.**—The obligation of a master to use reasonable diligence to have the machinery, appliances, tools and premises, with and on which his servants work, in a safe condition, is one that can not be delegated.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

ALBERT M. CROSS, attorney for appellant; W. H. LYFORD and J. B. MANN, of counsel.

JAMES C. McSHANE, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action to recover the pecuniary loss sustained by the next of kin of John Driscoll, a switchman, who was killed in the yard of appellant while working for it.

The deceased belonged to a crew of men engaged in making up out-going freight trains and in breaking up

incoming trains, placing defective cars on stub tracks and distributing them to different points in the yards.

At the termination of one of three stub tracks there was not a butting-post. The night of the accident a car was standing partially on this, one pair of wheels having run off the end and resting on the ground. How this car came to be thus partially off the track is unknown.

A yard master gave directions to pull out the cars standing on this track; the deceased, in the discharge of his duty, was at this time engaged in setting switches; when the car, partially off the track, was pulled along it ran into a car on an adjoining track, and the deceased, being caught between the two, was thrown down and killed.

The accident happened in the evening, after dark.

We do not think that this case turns upon the question of whether it was the duty of appellant to have placed butting-posts upon the stub tracks.

Appellant is chargeable with notice of the condition in which its cars were when it moved them.

Appellant was bound to exercise reasonable diligence to see that its cars were in such condition and place that its employes would not be exposed to unnecessary danger in working about them.

The deceased had a right to presume that appellant had performed such duty. Wood on Master and Servant, Secs. 326, 347, 348, 349, 434; Illinois Steel Co. v. Schymanowski, 162 Ill. 447; Hines Lumber Co. v. Ligas, opinion filed January 21, 1897, 1st Dist. Ill. App.

A little attention would have enabled appellant to know that a car it moved was off the track, and this, whether it had been off some days or only a few moments.

The deceased was not bound to examine as to the condition of the car he was ordered to assist in moving, and there is nothing tending to show that he knew of its dangerous position.

It is contended that the order to pull out the train containing the car off the track, was given by a fellow-servant of the deceased.

Northern Trust Co. v. Palmer.

It must be presumed that the jury found, as there is evidence to show, that this order was given by Blake, a yard master, and not a fellow-servant of the deceased.

However this may be, the accident would not have happened had not a car been off the track. The defective and dangerous condition of this car, which appellant undertook to move, resulted in the death of the intestate. The obligation of appellant to use reasonable diligence to have the machinery, appliances, tools and premises with and on which its servants work, in a safe condition, is one that can not be delegated. Wood on Master and Servant, Sec. 453; Hines Lumber Co. v. Ligas, 1st Dist. Ill. App.; opinion filed January 21, 1897.

We regard the declaration as sufficient to sustain the verdict, and find no error as to receiving or rejecting evidence, or in instructions given or refused, warranting a reversal of the judgment of the court below.

The judgment of the Circuit Court is affirmed.

70 93
171 383

The Northern Trust Company, Executor, etc., v. William H. Palmer, Executor, etc.

1. **ABATEMENT**—*Death of all the Parties to a Suit.*—Under Secs. 10, 11, 12 and 13 of Chapter 1, R. S., a court may order the substitution of the personal representatives of the parties to a suit where all the parties, both plaintiff and defendant, die during the pendency of the suit.

2. **TORTS**—*Liability of Landlord for Acts of an Employee.*—In actions for torts there are no accessories, those who command and those who do are equally guilty, and a landlord under an obligation not to disturb his tenant, can not, by his agents, destroy the value of a tenancy, and if he does, he is responsible for the injury inflicted.

Trespass on the Case, for wrongfully removing the wall of a building. Appeal from the Circuit Court of Cook County: the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

JESSE HOLDOM, attorney for appellant.

REMY & MANN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Marie M. Fenton began an action of trespass on the case against Cyrus M. Hawley, upon whom process was served; thereafter the plaintiff and defendant died; thereupon appellant was appointed executor of the last will and testament of Cyrus M. Hawley, and appellee was made executor of Marie M. Fenton.

Thereafter the death of Cyrus M. Hawley and Marie M. Fenton was suggested, and by order of court appellant and appellee were substituted as plaintiff and defendant.

It is contended that all the parties to the cause having died, the suit abated and could not be revived.

We think that the action of the court in ordering the substitution was within the intent of Secs. 10, 11, 12 and 13 of Chapter 1 of the Revised Statutes.

The action was by a tenant of 210 and 211 Wabash avenue, against his landlord, the owner, for taking down a wall of said building, and thereby damaging the goods of the deceased, Marie M. Fenton, then in the premises.

It appeared in evidence that Hawley, the landlord, made a contract with Simon and Philip Florsheim to take down the south wall of said building, which contract left the contractors at liberty to pursue such method as they saw fit, subject to certain stipulations as to shoring up, not changing the front, etc.

Appellant contends that the Florsheims were independent contractors, and they alone are responsible for the injury done to the tenant.

In actions for torts there are no accessories; those who command and those who do are equally guilty. Hawley was under an obligation not to disturb his tenant in her possession and use; he could not by his agents, the Florsheims, destroy the value of her tenancy, tear down the walls of the building he had rented to her, and not himself be responsible for the injury she suffered. Bishop on Non-

High Court Ind. Order of Foresters v. Edelstein.

Contract Law, Sec. 604; Cooley on Torts, 547; Village of Jefferson v. Chapinan, 27 Ill. App. 43; City of Joliet v. Harwood, 86 Ill. 110; Sherman & Redfield on Negligence, Sec. 176.

The case is not of an injury to one with whom Hawley sustained no contractual relations, as was Chicago City Ry. Co. v. Hennessy, 16 Ill. App. 153.

Hawley procured the doing of damage to his tenant; employed the Florsheims to do that which necessarily damaged her. The injury to her was not the result of negligence on the part of the contractors, but a necessary consequence of their acts, and such as Hawley employed them to do.

The judgment of the Circuit Court is affirmed.

70	95
86	37
70	95
108	50

High Court of the Independent Order of Foresters of the State of Illinois v. Hannah Edelstein.

1. **BENEFIT SOCIETIES—Good Standing of Members—How Shown—Presumptions as to.**—The issuing of a certificate of membership by a mutual benefit society is evidence of the holder's good standing in the order when it issued, and such good standing will be presumed to continue, unless there is proof that it no longer exists. The burden of proving loss of good standing rests upon the society.

2. **SAME—Forfeiture of Membership.**—A provision in the constitution of a benefit society, that members "shall be dropped from membership in the order" for failure to pay assessments is not self-executing, but requires, in order to terminate the membership, the affirmative action of the corporation to ascertain and declare the forfeiture.

3. **SAME—Loss of Good Standing In—How Shown.**—The fact that a member of a benefit society, is not in good standing in the order can only be shown by the records, minutes or proceedings of the order itself. Such a society being a corporate body, its attitude toward a member can only be shown through its action as such corporation.

Assumpsit, on a benefit certificate. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

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SEYMOUR STEDMAN, attorney for appellant; CHARLES H. SOELKE, of counsel.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

One Israel Edelstein was a member of a subordinate court of the appellant order, and an endowment certificate for one thousand dollars was issued to him by appellant on April 21, 1889, payable to the appellee, his mother, and he died May 12, 1893.

The defense to the suit that was begun on the certificate was that the deceased was not a member in good standing in the order at the time of his death, owing, primarily, to his neglect to pay certain assessments.

The fact of the issuance of the certificate to him was evidence of his good standing at that time, and it will be presumed to have continued until the contrary be shown, and the burden of showing that contrary was upon the order. *Independent Order v. Zak*, 136 Ill. 185; *N. W. Traveling Men's Assoc. v. Schauss*, 148 Ill. 304.

Section 7, Article XVI, of the Constitution of the Order provides, amongst other things, as follows :

"Immediately upon the receipt of notice of assessment, the financial secretary of each subordinate court shall send a notice to each member, and if any member fails to pay the amount of said assessment within thirty days from the date of the notice, he shall be dropped from membership in the order."

Assuming that the requisite notice to Edelstein was given and received, and that he failed to pay the assessments for the three or four months preceding that in which his death occurred, he did not thereby, *ipso facto*, cease to be a member in good standing.

The provision above quoted, that he should in such case "be dropped from membership," was not self-executing. There yet remained something to be done to determine his

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standing, and in such respect there is a difference between this case and that of Hansen v. Sup. Lodge, 40 Ill. App. 216, wherein the provision there being considered was held to be self-executing. Same Case, 140 Ill. 301.

The provision here, is like that in Northwestern Traveling Men's Association v. Schauss, 51 Ill. App. 78, where we held, distinguishing it from the Hansen case, that the provision was not self-executing, but required, in order to terminate the membership, the affirmative action of the corporate body to ascertain and declare the forfeiture. And in so holding we were sustained by the Supreme Court in the same case, reported in 148 Ill. 304.

Was such affirmative action by the order ever taken in this case? If it were, it must be proved by the records or proceedings of the order itself. Ind. Order, etc., v. Zak, *supra*.

Some attempt to prove action taken by the order in the case of the deceased was made, but the book that the witness purported to read from was not shown to be, or to contain, any part of the records of the order, nor did it appear in any way that the minutes were those of a quorum of any body of members, officers or other persons.

So far as this record shows, the deceased was never "dropped" from membership or his membership in any way terminated.

The judgment of the Superior Court is therefore affirmed.

Chicago City Railway Co v. Catherine Catlin.
Same v. William E. Catlin.

1. CARRIERS—*The Rule as to Presumption of Liability for Injury to Passengers Stated.*—If an injury to a passenger is caused by apparatus wholly under the control of a carrier and furnished and applied by it, a presumption of negligence on its part is raised, but it is only when the injury occurs from the abuse of agencies within the carrier's power that

70	97
90	400

70	97
118	1890

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it can be inferred, from the mere fact of the injury, to have acted negligently.

2. INSTRUCTIONS—*Accuracy Required in Close Cases.*—In closely contested cases, especially where, on the record, the verdict seems to be against the preponderance of the evidence, the instructions on behalf of the successful party must be accurate.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

WILLIAM J. HYNES and SAMUEL S. PAGE, attorneys for appellant.

MALCOLM DALE OWEN and SETH F. CREWS, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

For injuries to the appellee in the first above entitled cause, suffered, as she alleged, by being thrown from a car of the appellant in which she was being carried as a passenger, she brought suit and recovered; and the appellee in the second above entitled cause, husband of the first mentioned appellee, brought suit for the alleged loss of society and assistance suffered by him because of the injuries alleged to have been sustained by her in the same accident, and also recovered, and from such judgments these appeals are prosecuted.

Both cases were, by stipulation of parties, tried at the same time before the same judge and jury, on the same evidence, and on the same instructions, but as separate cases, each having a separate verdict, motion for new trial and judgment, and come here by separate appeals but upon one record.

The judgment in favor of Catherine was for \$10,000 and that in favor of William was for \$3,000.

We need not review the evidence.

The appellees' claim, as stated in the declarations, is that

the car in which Catherine was riding had stopped for her to alight, and while she was in the act of alighting, suddenly started up and threw and injured her.

The appellant's claim is that while the car was slowing up for the purpose of stopping to permit Catherine to alight, and before it had stopped, she hastily and negligently stepped off into a wet and slippery place, and was overthrown by her own carelessness.

The first instruction, given at the request of appellees, was as follows:

"1. The court instructs the jury: That if you believe from the evidence, that the plaintiff received the injury complained of while riding on the cars of the defendant, and that at the time of such injury, the plaintiff was in the exercise of reasonable care and caution to prevent such injury, then the presumption is, that the accident or injury occurred through the fault or neglect of the defendant's servants, and the onus is on the defendant company to show by a preponderance of the evidence that it was not negligent in the operation of its said cars at the time of said injury."

An instruction better calculated to mislead an honest, impartial jury, anxious to do their duty, and believing it to be their duty to obey the law as the court might declare it to be, could hardly have been given.

It was the appellant's position that she, appellee, did receive the injury "while riding," *i. e.*, while the cars were in motion.

Literally she received the injury after she was on the ground, and it is perhaps too strict to say that the word "riding" could not be applied to being on the car after it stopped.

Omitting criticism upon the use of the word "reasonable" instead of ordinary (Ill. Cent. R. R. v. Noble, 142 Ill. 578), then the instruction, in effect, told the jury that if the act of stepping from the car while it was in motion was not inconsistent with the exercise of reasonable care and caution—which, as probably most of the jurors were in

the possession of ordinary physical activity, they might easily have believed—"then the presumption is that the accident or injury occurred through the fault or neglect of the defendant's servants."

That clause being followed by the "onus," of which there is no presumption that the jury knew the meaning, is not thereby relieved of its vicious feature.

The fault is much the same as in *City of Chicago v. Morse*, 33 Ill. App. 61.

Although courts have not always guarded the language in which the doctrine of presumptions against passenger carriers has been expressed, yet the meaning has always been clear that the doctrine is as stated in *N. Y. C. & St. L. R. R. v. Blumenthal*, 160 Ill. 40: "If the injury to a passenger is caused by apparatus wholly under the control of the carrier and furnished and applied by it, a presumption of negligence on its part is raised," quoted from page 48 of that case.

"It is only when the injury occurred from the abuse of agencies within the defendant's power that he can be inferred, from the mere fact of the injury, to have acted negligently."

Wharton Negl., Sec. 661, referred to with approval in *North Chi. St. Ry. v. Cotton*, 140 Ill. 486; *Chicago City Ry. Co. v. Rood*, 163 Ill. 477.

In all the cases in which general language is used, the special facts of the cases—as in *G. & O. N. R. R. v. Yarwood*, 15 Ill. 468—supplied the qualifying words.

In closely contested cases—especially where on the record the verdict seems to be against the preponderance of the evidence—the instruction on behalf of the successful party must be accurate. *Craig v. Miller*, 133 Ill. 300.

The judgments are reversed and the causes remanded.

North Chicago Street Railroad Company v. Eunice Honsinger.

70	101
175	318
70	101
112	307

1. **VERDICTS**—*On Conflicting Evidence.*—The evidence in this case is conflicting, and the jury having resolved the doubt in favor of appellee their verdict must stand.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. HENRY V. FREEMAN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

STATEMENT OF THE CASE.

This was an action by Eunice Honsinger to recover damages for personal injuries alleged to have been received through the negligence of the North Chicago Street Railroad Company.

The plaintiff was a passenger on the North Clark street car of the defendant, north-bound, and when the car arrived at or near the intersection of Clark and Center streets it came to a sudden stop, whereby the plaintiff was thrown against the dash-board of the car and received injuries.

The defendant admitted a technical liability, but no damages.

On the trial the jury found the defendant guilty and assessed the plaintiff's damages at \$4,000; and judgment having been entered on the verdict the defendant brings the record to this court for review.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

DENT & WHITMAN, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

In this case it appeared that the plaintiff, eleven years previous to the accident, had suffered a miscarriage. She had not consciously suffered therefrom.

Various medical experts testified in the present case that pains and troubles from which she now complains are the result of that miscarriage, and especially of a lacerated condition of the cervix of the womb, which laceration they attribute to the miscarriage and not to the accident.

Other experts attributed all the pains appellee now endures to the accident.

The jury, quite naturally, resolved the doubt in favor of the sufferer and against the corporation.

In view of instructions numbers six and seven, given at the instance of the defendant, we do not think that the jury were misled by instruction number two, given at the request of the plaintiff.

If the present state of appellee is attributable to the accident, the damages awarded are not excessive.

The judgment of the Superior Court is affirmed.

Emma E. Orcutt v. Sarah M. Isham.

1. LANDLORD AND TENANT—*Waiver of Ground of Complaint by Tenant—Estoppel.*—A tenant remaining in possession and paying rent not only for months during which a cause of complaint existed, but for several months afterward, is estopped from setting up such cause of complaint in justification of an abandonment of the premises.

2. SAME—*Tenant Liable for All Rent Agreed On—Exceptions.*—A tenant having entered is liable for all the rent as agreed, notwithstanding he has ceased to occupy, unless something has happened to put an end to the tenancy.

3. SAME—*No Relief Against Covenant to Pay Rent Unless, etc.*—It is a general rule of law that a lessee has no relief against an express covenant to pay rent unless he has protected himself by an express covenant in the lease; he is not at liberty to select such portions of the term as he is pleased to enjoy and repudiate the balance.

4. PRACTICE—*Remarks by the Court During Trial.*—Though part of the language used by a judge at a trial may have been subject to criticism, the remarks should not cause the reversal of a judgment which is substantially right upon the whole record.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard

Orcutt v. Isham.

in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

H. S. & F. S. OSBORNE and ROBERT F. PETTIBONE, attorneys for appellant.

COWEN & HOUSEMAN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$167.50 for rent due under a written lease of a flat to be occupied as a dwelling, "including steam heat and hot water at all times as may be required by the party of the second part."

The lease was for a term beginning February 15, 1894, and ending April 30, 1895, at a gross rental of \$725, payable in monthly installments of \$50 each.

The appellant occupied the premises from February 15th until the end of June, 1894, when she sub-let them and went to the country for July, August and September. Returning from the country on October 1st, she again occupied the flat until October 15, 1894, when she vacated it and refused to pay any more rent.

The recovery was for the rent at the stipulated rate for a period of two months from October 15th to December 15th, during which period the flat remained vacant, and the difference of \$15 a month between the stipulated rent and the price for which the flat was re-rented for the remaining four and one-half months of the term.

Appellant's principal defense was a breach by appellee of her agreement and duty to furnish a requisite amount of steam heat and hot water.

All the evidence upon that question related to the winter months and cold weather from February 15, 1894, to the end of June, 1894, during all of which time, and three and a half months longer, the appellant paid her rent.

There is no evidence that there was an insufficient supply of heat or water during the months of July, August and September, in which appellant's sub-tenant occupied the

flat, nor that there was any such lack during the first half of October, 1894, in which appellant resumed and continued her occupancy.

The appellant herself testified that she moved out because she was "afraid to try it the rest of the winter." In other words, she moved out because of something she feared in the future, and not because of what existed in the present or had existed in the past. All complaints that may have existed in the past were waived by the appellant by paying all rent for the months in which occasion for complaint existed. Remaining in possession and paying rent not only for such months, but for several months afterward, the appellant is estopped from setting up such past cause of complaint in justification of her present abandonment of the premises, and she showed no cause of complaint that existed when she moved out. *Non constat* but that all causes of complaint had been remedied.

A lessee is not at liberty to select out such portion of the term as she is pleased to enjoy and repudiate the balance.

As this court said, in *Smith v. McLean*, 22 Ill. App. 451: "It is the general rule of law that a lessee has no relief against an express covenant to pay rent unless he has protected himself by a stipulation in the lease."

So where a term has commenced, the tenant having entered, he is liable "to all the rent as agreed, notwithstanding he has ceased to occupy; unless, indeed, something has since happened to put an end to the term or tenancy, as a surrender by deed, or by act and operation of law." *Wood's Landlord and Tenant*, 959.

All questions of fact were passed upon by the jury, and we see no occasion to discuss them to any greater extent than we have.

Remarks made by the trial judge in the presence of the jury are complained of as expressing an opinion upon the law and facts of the case, and as amounting to an oral instruction to the jury.

A part of the language that was used is subject to criti-

Feyreisen v. Sanchez.

cism, and might better have been omitted, but it was addressed to a witness on the stand who was testifying very indefinitely, and needed to be reminded that general expressions of what was done and said were insufficient to destroy the obligations of a lease; and, even though partaking of error, the remarks should not cause the reversal of a judgment which is substantially right upon the whole record.

There was no material error in the admission of evidence, nor in the giving and refusal of instructions, and the judgment will be affirmed.

P. L. Feyreisen v. Mary Sanchez.

1. **LEASES—Beginning of Term, Where No Time is Fixed—Oral Contracts.**—An oral agreement for a lease fixed no time for its commencement, but the lessee moved in and paid five months rent, which the lessor accepted. *Held*, that oral contracts are proved not only by what the parties say but by what they do, and that in this case they had by their acts fixed the time of the beginning of the term.

Bill for Specific Performance.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded with directions. Opinion filed May 6, 1897.

ALBERT MARTIN, attorney for appellant.

WHEELER, AUSTIN & LENNARDS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a bill to enforce the specific performance of an agreement, which we assume was by parol, for a lease from the appellee to the appellant of certain premises for one year with the option to the appellant of an extension for four years more. It is not necessary to state the fact of part performance, which takes the case out of the operation

of the statute of frauds, as the appellee relies in the brief filed here wholly upon the one feature of the agreement that in it no time was specified for the commencement of the lease. But the appellant moved in, and has paid five months rent, which the appellee has accepted, and thus by their acts the parties fixed the time the term began. Oral contracts are proved not only by what the parties said, but by what they did, and as by words the parties agreed upon a term of one year, with an option of four more, so by their acts they put into their agreement the day for the beginning of the term.

The bill stated all the facts, and on demurrer the Court dismissed it.

The decree is reversed and the cause remanded, with directions to overrule the demurrer, and proceed with the cause in accordance with the usage and practice of courts of equity.

Reversed and remanded with directions.

70	106
70	365
70	106
171	332

Frank T. Kinnare, Adm'r, etc., v. City of Chicago and The Board of Education of the City of Chicago.

1. PLEADING—*What is Surplusage in.*—In an action of trespass on the case an allegation that the defendant had "promised and undertaken" is mere surplusage. Such an action does not lie for a breach of a contract; though the fact that the wrong done, or duty neglected, does constitute a breach of contract, is no obstacle to the action.

2. NEGLIGENCE—*Failure to Fence Roof.*—A person who, knowing its condition, accepted work upon the roof of a building, can not recover against his employer for injuries caused by a fall from such roof, on the ground that the roof was not fenced.

3. PLEADING—*When Ignorance of Existing Conditions Should be Pleading.*—A servant sued his master for injuries caused by a fall from the roof of a building alleging negligence in failing to have the roof fenced. *Held*, that if the servant did not know of such neglect and desired to rely upon such ignorance on his part his want of knowledge should have been averred.

Trespass on the Case.—Death from negligent act. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge,

Kinnare v. City of Chicago.

presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

JAMES MAHER, attorney for appellants; A. W. BROWNE, of counsel.

DONALD L. MORRILL, attorney for appellee, the Board of Education of the City of Chicago.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

We shall omit all consideration of the rights, duties and liabilities of the appellees peculiar to their corporate or quasi corporate character, and inquire only whether the declaration to which the Superior Court sustained a demurrer and entered thereon final judgment for the appellees, states what would have constituted a cause of action against individuals.

The appellant sues in case, as the administrator of Maurice McDonnell, and so much of the declaration as need be set out is as follows:

"For that, whereas, the defendants, on or about the 21st day of July, A. D. 1896, at the city of Chicago, in the county of Cook, were engaged in erecting and roofing a certain high building known as the 'Deaf Mute School,' and had then and there engaged the services of the said Maurice McDonnell in his lifetime to work on and about the roofing of the said building, and had then and there promised and undertaken with the said Maurice McDonnell that, if he would work upon the roof and roofing of said building, they would provide and furnish reasonably adequate safeguards, scaffolding and protective appliances around, upon and about the roof of said building, to prevent him falling from the said roof whilst he was working thereupon, and in the exercise of reasonable care about his own safety, and relying thereupon, the said Maurice McDonnell then and there entered upon the said employment and roofing work.

Yet the plaintiff avers at the time aforesaid, at the place aforesaid, and whilst the said Maurice McDonnell was then

and there rightfully and with all reasonable care and diligence about his own safety, working upon the roof and roofing of said building, the said defendants then and there carelessly, negligently, wrongfully and improperly wholly neglected and failed to provide and furnish any reasonably adequate safeguards or scaffolding or protective appliances around, upon and about the roof of said building to prevent him from falling or being precipitated therefrom, and by means thereof, and for want of such safeguards, scaffolding and protective appliances, the said Maurice McDonnell then and there unavoidably on his part fell and was precipitated from off the roof of said high building down to and upon the ground below, and was thereby then and there killed."

Now what is there alleged of "promised and undertaken" is mere surplusage. An action on the case—not assumpsit—does not lie for a breach of contract; though the fact that the wrong done, or duty neglected, does constitute a breach of contract is no obstacle to the action. *Nevin v. Pullman P. C. Co.*, 106 Ill. 222; especially what is on page 236.

Then the case stated amounts to this: The deceased worked upon a roof, and—as he knew—without being fenced in, and fell off—I say "as he knew," because if it be part of the case that he did not know, such want of knowledge should have been averred. *United States R. S. Co. v. Chadwick*, 35 Ill. App. 474; 2 *Thomp. Negl.* 1050.

That is no case, and the judgment is affirmed.

Cassius M. Upton v. The Elite News, for Use, etc.

1. **MEASURE OF DAMAGES**—*Contract Calling for Part Payment in Merchandise.*—A agreed to render certain services to B, payment to be made one-half in books handled by B and one-half in cash. A sued for the entire amount agreed upon. *Held*, that he was only entitled to recover one-half of the amount agreed on, as the evidence failed to show that he had selected or designated the books he would take.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in

Upton v. The Elite News.

this court at the March term, 1897. Affirmed if remittitur be entered, otherwise reversed and remanded. Opinion filed May 6, 1897.

SETH F. CREWS, attorney for appellant.

A suit is a legal demand for money only, and an action will not lie upon a contract payable in anything other than money until after a special demand made; and the plaintiff must allege and prove a demand before suit is brought." Am. & Ency. of Law, Vol. 5, p. 528, citing Wyatt v. Bailey, 1 Moor (Iowa), 396; Decker v. Burhap, Id. 62.

"In order to support an action on a contract to be performed by delivery of property, a special demand must be proved." Bradley v. Farrington, 4 Ark. 532; Martin v. Chauvin, 7 Mo. 277.

An action does not lie for the value of wheat which is to be delivered when threshed, until demand has been made for the wheat. State v. Mooney, 65 Mo. 494.

To enable a party to recover in an action on a due-bill, payable in specific property, no time being mentioned, a demand is necessary; otherwise what time and place are specified. Widnea v. Walsh, 3 Colo. 548, citing Lobdell v. Hopkins, 5 Cowp. 516; Vance v. Bloomer, 20 Wend. 196; Stewart v. Smith, 28 Ill. 397; Bilderbank v. Burlingame, 27 Id. 337.

SMITH, SHEDD, UNDERWOOD & HALL, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued for the compensation due to it for the performance by it of a contract, as follows:

OFFICE OF THE ELITE NEWS,
317 Rookery Bldg., Chicago.
CHICAGO, March 9, 1893.

C. M. Upton, Monon Bldg., City.

DEAR SIR: In reference to the matter of advertising in the 'ELITE,' in case you accept our offer for one column one year for seven hundred forty-eight (\$748) dollars net, placed

next reading matter, we will also publish three illustrated articles to occupy not more than a full page each and in different issues of the paper, without charge, payable one-half in books handled by C. M. Upton, balance in monthly payments.

ELITE NEWS Co.,
H. A. PIERCE, Manager.

Accepted.

C. M. UPTON."

We will not repeat the evidence, which shows that the appellee fully performed, except as to "illustrated articles," from which it was excused by the neglect of the appellant to furnish copy, but by which the appellee saved ten dollars of expense.

The appellee has recovered seven hundred and twenty-eight dollars, which is wrong, because the appellee never selected or designated the books it would take, and the appellant could not select for it. *Woods v. Dial*, 12 Ill. 72. The half payable in money, less half the expense saved, the appellee was entitled to recover, but no more.

That amount is \$369, to which, if the appellee will, within ten days after this opinion is filed, remit, the judgment will be affirmed for that sum; otherwise the judgment will be reversed and the cause remanded.

In either case, the appellant recovers his costs here.

Mary McElherne v. Michael Maher.

1. *CONTRACTS—Requisites of a Recovery Upon.*—A entered into a contract with B for the purchase of certain real estate, and made a payment on account. In an action to recover such payment there was no evidence that A ever offered or was ready to perform the contract, that he ever demanded the money back, or that he ever rescinded or offered to rescind the contract. *Held*, that he was not entitled to recover.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

M. V. GANNON, attorney for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A written contract for the sale by appellant to appellee of certain real estate for the sum of \$4,900 was made on October 21, 1890, and \$75 as part payment thereon was made by appellee at the same time, and on February 25, 1891, such contract was filed for record in the recorder's office by the appellee.

This suit to recover back said sum of \$75 was begun by appellee before a justice of the peace, where, being defeated, he appealed to the Circuit Court, and there recovered the judgment for said \$75 which is appealed from.

The judgment is wrong. There was no evidence that appellee ever offered or was ready to perform the contract upon which he paid the money, and there was no evidence that he ever demanded back the money, or that he ever rescinded or offered to rescind the contract. Upon the other hand, the filing for record by him of the contract, and making no offer to release it until after verdict, evidenced an intention on his part to treat it as in full force.

Under such circumstances, appellee was not entitled to recover, and the judgment will be accordingly reversed and the cause remanded.

West Chicago Street Railroad Company v. William H. Ranstead.

1. **ORDINARY CARE—A Question for the Jury.**—Whether a person who was struck by a street car was exercising ordinary care is a question for the jury, and in considering it, they may take into consideration, the usual conduct of ordinarily prudent and careful persons in threading their way across streets thronged by the multitudes of a great city.

2. *SAME—Drunken Man Entitled to the Exercise of, for His Protection.*—A drunken man is as much entitled to the exercise of ordinary care for his safety as a sober one, and much more in need of it.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed if remittitur be entered, otherwise reversed and remanded. Opinion filed May 6, 1897.

ALEXANDER SULLIVAN, attorney for appellant; E. J. McARDLE, of counsel.

In the highway the rights of the pedestrian and public are mutual, concurrent and reciprocal, but in the tracks the traveler's right is subordinate, the cars superior. Booth, St. Ry. Law, Sec. 303; Chicago, B. & Q. R. R. Co. v. Lee, Adm'r, 87 Ill. 454; Baker v. Eighth Ave. R. R. Co., 69 N. Y. Sup. Ct. 39 (62 Hun); Carson v. Fed. St. Ry. Co., 35 Cent. L. J. 145; Child v. N. O. & C. R. R. Co., 33 La. Ann. 154; Donnelly v. B. City R. R. Co., 109 N. Y. 16; Ehrisman v. E. H. C. P. Ry. Co., 24 Atl. R. 596; Fleckenstein v. D. D. E. B. & B. R. Co., 105 N. Y. 655; Smith v. M. C. R. R. Co. 87 Me. 339; Thomas v. Citizens P. Ry. Co., 132 Pa. St. 504; Warner v. People's St. Ry. Co., 141 Pa. St. 615; Wilbrand v. Eighth Ave. R. R. Co., 3 Bosw. 5 N. Y. Sup. 314.

A person taking a more than ordinarily dangerous course must exercise vigilance proportioned to the danger. Beach, Contributory Negligence, Sec. 9, p. 22; Barker v. Savage, 45 N. Y. 191; B. & O. R. R. Co. v. Whitacre, 35 Ohio St. 627; Chicago, B. & Q. R. R. Co. v. Olson, 12 Ill. App. 245; Chicago & N. W. Ry. Co. v. Rielly, 40 Ill. App. 416; Chicago, R. I. & P. R. R. Co. v. Houston, 95 U. S. 697; Childs v. N. O. City R. R. Co., 33 La. Ann. 154; Gumb v. 23d St. Ry. Co., 53 N. Y. Super. Ct. 466; Miller v. St. P. Ry. Co., 42 Minn. 454; Mayor of N. Y. v. Bailey, 2 Denio. (N. Y.) 433.

Taking place of danger is an assumption of all attending risks. Illinois C. R. R. Co. v. Beard, 49 Ill. App. 232; Illinois C. R. R. Co. v. Hall, 72 Ill. 222; Simmons v. T. H. & I. R. R. Co., 110 Ill. 340; Peoria v. Walker, 47 Ill. App.

182; *Beach*, Contrib. Neg., Sec. 12; *Halpin v. 3d Ave. R. R. Co.*, 40 N. Y. Super. Ct. 175; *Johnson v. Canal & C. Ry. Co.*, 27 La. Ann. 53; *Mercier v. N. O. & C. R. R. Co.*, 23 La. Ann. 274; *Miller v. St. P. Ry. Co.*, 42 Minn. 454; *Morris v. L. S. & M. S. Ry. Co.*, 42 N. E. R. 579; *Rose v. Phila. R. R. Co.*, 12 Atl. R. 78; *Smith v. M. C. R. R. Co.*, 87 Me. 339; *Trouselair v. Pac. C. S. Co.*, 80 Cal. 521.

The gripman had a right to assume appellee would take precautions commensurate with the dangers naturally incident to the situation, or created by his own conduct. *Bunyan v. Citizen's Ry. Co.*, 29 S. W. R. 842; *Everett v. Los A. C. E. Ry. Co.*, 43 Pac. R. 207; *Glazebrook v. W. End St. Ry. Co. (Mass.)*, 35 N. E. R. 553; *Fenton v. 2d Ave. Rd. Co.*, 26 N. E. R. 967; *Moore v. P., W. & B. R. R. Co.*, 108 Pa. St. 349; *Poole v. N. Car. & C. R. Co.*, 8 Jones L. (N. C.) 340; *Starry v. D. & S. W. R. Co.*, 51 Ia. 419.

Collision on a railroad crossing with a traveler is presumptive evidence of his negligence. *Smith v. M. C. R. R. Co.*, 87 Me. 339; *Hooper v. B. & M. R. R. Co.*, 81 Me. 261.

CASE & HOGAN and MUNSON T. CASE, attorneys for appellee.

A street railroad company has not the exclusive right to the use of the public streets, but only to the use of them jointly with the balance of the public, and therefore its servants must take notice of the number of travelers liable to be on the streets at street crossings, and must exercise the care demanded by the increased danger at such points. *Chicago City Ry. Co. v. Jennings*, 157 Ill. 278; *Baltimore Traction Co. v. Wallace*, 77 Md. 435.

In the State of Illinois the right of a traveler to use a street is not subordinate to the right of a railroad company to use their cars thereon. *Chicago West Division Ry. Co. v. Ingraham*, 131 Ill. 661.

The gripman had no right to assume that the appellee would take unusual precautions; and it is improper for any court to say, as a matter of law, that the gripman might presume anything. Presumptions have nothing to do with

the questions involved. Illinois Central R. R. Co. v. Slater, 139 Ill. 199; Chicago & A. R. R. Co. v. Sanders, 154 Ill. 538.

A collision on a railroad crossing with a traveler is not presumptive evidence of his negligence. Chicago, St. L. & P. R. R. Co. v. Hutchinson, 120 Ill. 593; Lake Shore & M. S. Ry. Co. v. Hessons, 150 Ill. 546.

The questions of negligence of the appellant and care were properly submitted to the jury. Chicago & A. R. R. Co. v. Fisher, 38 Ill. App. 40.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

On the 28th day of February, 1894, the appellee, then in his fifty-fifth year, but with, so far as appears, mental and physical powers unimpaired by age or disease, left the hotel where he lodged between five and half past five o'clock p. m. to go north across Madison street, for his supper. His route was over the west cross-walk of Dearborn street.

In the language of the clerk of the hotel, "he" (the appellee) "was sober enough to walk, and drunk enough to be a little noisy," which description of his happy condition is corroborated by the testimony of the proprietor of the hotel.

When he reached the cross-walk, a street car of the appellant was standing on the track, and his own version of the accident, copying from the abstract, is as follows:

"The Madison street car, with reference to the west side-walk of Dearborn street, was standing about ten feet west on Madison. As I stepped over the first rail, the car struck me and threwed me under the car and rolled me there about twenty feet—ketched me as I was stepping over the first rail and was just going on the track. As I was stepping over the first rail, the south rail, with this foot first and was going with the other, it caught me in the hip and throwed me against another gentleman that was walking side of me."

To a man attentive to his surroundings, and in the exercise of ordinary care, no such accident could have happened.

The home of the appellee had been in Chicago nearly all his life. He knew, or if he had given a thought to the matter, would have known, that the car was stopped only momentarily.

Thus far I have written my own opinion, but the majority of the court does not agree to the conclusion at which I arrive.

In the opinion of my colleagues, the question of care by the appellee was for the jury—that in considering it, they might take into consideration the usual conduct of ordinarily prudent and careful persons in threading their way through the crowds, and crossing the streets thronged by the multitudes of the great bustling city.

Also, that other testimony presents the manner of the accident more favorably to the appellee than does his own. A policeman stationed at the crossing, testified that the car was about six feet west of the crossing, and that as the appellee “stepped onto the track the car shoots forward, and Ranstead makes a plunge to get off the track, * * * and the car struck Ranstead and knocked him against another man,” and Ranstead fell under the car.

It is in evidence that to cross Dearborn street, cars—they are cable cars—have to make the crossing by the momentum gained before reaching the cable by which another line of cable cars is run upon Dearborn street, at a right angle to the Madison line.

What influence that necessity had upon the care required of the appellant not to injure pedestrians at the crossing—or rather, whether the appellant did in fact exercise such care—was another question for the jury.

Paraphrasing the language in *Robinson v. Pioche*, 5 Cal. 461, a drunken man is as much entitled to the exercise of such care as a sober one, and much more in need of it.

We all agree that no error is in the record, if upon the evidence the verdict of the jury was justifiable.

The jury awarded ten thousand dollars. After a remittitur of one-fourth of the verdict—probably as a condition of entering judgment for the appellee—the court entered judgment for the other three-fourths.

It is the judgment of this court that those fractions should be exchanged, and that if within ten days after this opinion is filed, the appellee enter another remmittitur of five thousand dollars, the judgment be affirmed for twenty-five hundred dollars; otherwise that the judgment be reversed and the cause remanded; in either event at the cost of the appellee.

70	116
171s	572
70	116
86	513

Siegel, Cooper & Company v. Mary A. Connor.

1. FALSE IMPRISONMENT—*Arrests by Private Persons*.—A private person has no right to arrest another on mere suspicion that he has been guilty of a crime, and an arrest by a private party can not be justified unless a crime has been committed and the person arrested is shown to be the guilty party.

2. VERDICTS—*Upon Conflicting Evidence*.—Whether facts alleged as a cause of action or defense are proved, is a question for the jury, and where the evidence is conflicting their verdict is final.

Trespass, for false imprisonment. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

A. BINSWANGER and S. P. SHOPE, attorneys for appellant.

LOUIS SPAHN and MARCUS KAVANAGH, attorneys for appellee.

A private person, in order to justify an arrest of one accused of felony, need not prove that the felony was committed beyond reasonable doubt. A mere preponderance of evidence is sufficient. *Lander v. Miles*, 3 Ore. 35.

If an innocent person is arrested upon suspicion by a private individual, such individual is excused if a felony was in fact committed, and there was reasonable ground to suspect the person arrested. *Mulligan v. N. Y. & R. B. Ry. Co.* 129 N. Y. 506.

A private person can not make an arrest, unless able to show conclusively, as justification, that a criminal offense

has been committed or attempted in his presence, and the person arrested is shown to have committed or attempted the criminal offense, and to be guilty. 1 S. & C. Stat., Chap. 33, Par. 401, 845; Kindred v. Stitt, 51 Ill. 407.

Regularly, under the common law, neither a private person nor a constable can, of his own authority, without warrant, arrest another for a misdemeanor, except for a breach of the peace, while the strife is going on, and to prevent its continuance. Hawkins, in "Pleas of the Crown," adds to the right as against actual night walkers, and actual cheats with dice, to prevent them from escaping. "But," observes Lord Tenterden, "these cases in Hawkins are where the party is caught in the act, and the party arrested is guilty."

Where the case is only one of suspicion, the arrest is unjustifiable in misdemeanor. In cases of misdemeanor the parties aggrieved should apply to a justice of the peace for a warrant, and not take the law into their own hands. 1 Addison on Torts, Sec. 154.

Such was the common law, and our statute has, in actual fact, made very little change in it. Newell on Malicious Prosecution, 68.

Furthermore, the only purpose for which private individuals may arrest persons (and as just shown, they may not arrest at all unless the arrested person is guilty of or attempting a criminal offense) is to have such guilty person examined by the proper officer. Newell on Malicious Prosecution, 434, 435.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was shopping in the mammoth store of the appellant—bought some articles for which she paid. She had with her three girls of eleven to thirteen years of age, two of them her nieces.

In the store was, or had been posted, a notice of a reward of two dollars for any person catching a thief—a notice of the dangerous influence of which the appellant probably became convinced, for before the trial of this cause it had been withdrawn.

A "saleslady" who had served the appellee charged her

with stealing two handkerchiefs, and, as a result, she was taken to the office of the manager, who exacted from her, and was paid, five dollars for the two handkerchiefs. The selling price of the handkerchiefs was not more than half a dollar each. Thus far there is no dispute. Whether she did steal the handkerchiefs; whether she acknowledged or denied that she did; whether she paid because of guilt, or because the girls with her were crying, are matters disputed:

The appellant had the advantage of having the case presented to the jury by the instructions as one in which malice and want of probable cause, on the part of the appellant, were necessary elements of the cause of action by the appellee.

But the case being one of arrest by a private person without process, such arrest could be justified only by proving the actual guilt of the appellee. *Kindred v. Stitt*, 51 Ill. 401.

Whether such proof was made was, upon the conflicting evidence, a question for the jury, and the verdict is final.

That the jury awarded exorbitant damages—\$11,000—may be conceded, but is easily accounted for. The enormous extent of the premises occupied by the appellant, and of the business which it conducted, could not be concealed from a Chicago jury, and when its manager exacted from the appellee five times the price of the goods which she was charged with stealing, as a condition of liberty, the foundation for smart money was laid.

The appellee remitted \$8,500 of the amount at the suggestion of the court, and judgment was entered for \$2,500.

We will not take time or space to review eight printed pages of the instructions; they were far more favorable to the appellant than the law will justify.

There is no error, unless in the amount of damages.

Shoplifting is a frequent crime, to which every possible check should be encouraged, but such checks should be such as not to offend the very common prejudice in favor of fair dealing. *Fair v. Himmel*, 50 Ill. App. 215.

The judgment is affirmed.

**Chicago & Alton Railroad Co. v. James Redmond, by
his Next Friend.**

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171	347
70	119
p118	*822
114	*504

1. **PLEADING—Evidence of Negligence Need Not Be Stated.**—It is not necessary to particularize the special acts of carelessness that cause an accident, or, in other words, to plead the evidence.

2. **NEGLIGENCE—Reliance Upon a Custom of a Railroad Company is Not.**—A person who is familiar with the custom of a railroad company to close gates maintained at a railroad crossing when a train is about to pass, and with the location and surroundings, has a right to rely upon the open gates as a notice to him that no train is close at hand, and as an invitation to him to make the crossing in safety, so far as an approaching train is concerned.

3. **VERDICTS—When Conclusive.**—Whether a plaintiff suing for personal injuries caused by the negligence of the defendant exercised due care for his own safety is a question for the jury; and where it is a question upon which ordinarily intelligent men may reasonably differ, and there is evidence enough to leave the question one of considerable uncertainty, a court of appeal has no right to override the finding of the jury.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

WILLIAM BROWN, General Solicitor, and M. J. SCRAFFORD, Ass't General Solicitor, attorneys for appellant; T. J. SCOFFIELD, of counsel.

The first count alleges generally that the defendant, by its servants, operated said train of cars so carelessly and improperly that the accident occurred (which resulted in the injury to the plaintiff. It would seem that this count is insufficient, in failing to particularize the special act of carelessness which caused the accident, on principle and under the opinion in *Chicago, B. & Q. R. R. Co. v. Harwood*, 90 Ill. 425.

It is the plain duty of every one who attempts to pass over a railroad crossing, either in a city or village, to observe the usual and proper precautions of looking in either direc-

tion and watching and listening for signals of danger before attempting to cross; and where it appears, either from direct testimony or from facts and circumstances in evidence, that a party is injured from want of these usual and prudent precautions, the law can afford no redress, however fearful the injury. *Chicago, B. & Q. R. R. Co. v. Van Patten, Adm'x, etc.*, 64 Ill. 510; *St. Louis, A. & T. H. R. R. Co. v. Manly*, 58 Ill. 300.

In *Lake Shore & M. S. Ry. Co. v. Hart*, 87 Ill. 529, our Supreme Court has time and again decided that it was the duty of every person about to cross a railroad track to approach cautiously and endeavor to ascertain if there is present danger in crossing, as all persons are bound to know that such an undertaking is dangerous, and that they must take all proper precaution to avoid accident in so doing, otherwise they could not recover for injury thereby received. See *Chicago & N. W. Ry. Co. v. Sweeney*, 52 Ill. 325; *Chicago, B. & Q. R. R. Co. v. Van Patten*, 64 Ill. 510; *Illinois Central R. R. Co. v. Godfrey*, 71 Ill. 500; *Illinois Central R. R. Co. v. Hall*, 72 Ill. 222; *Chicago, B. & Q. R. R. Co. v. Damerell*, 81 Ill. 450; *Illinois Central R. R. Co. v. Hetherington*, 83 Ill. 510; *Lake Shore & M. S. R. R. Co. v. Miller*, 25 Mich. 274; *Harlan v. St. L., K. & N. R. R. Co.*, 64 Mo. 480; *Fletcher v. The Atlantic & Pacific R. R. Co.*, 64 Mo. 484; *Gorton v. The Erie Ry. Co.*, 45 N. Y. 662; *Wharton on Negligence*, Sec. 384; *Chicago & N. W. Ry. Co. v. Dunleavy*, 129 Ill. 132.

WING, CHADBOURNE & LEACH, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The facts in the case are simple, and, except in minor particulars, are not in dispute.

The appellee was, when injured, sixteen years old. His home was in a little village named Hastings, a mile or so south of the village of Lemont, and on the Sunday morning in question he had come into Lemont to attend church.

After church he went with some companions to or near the corner of Stephens and Canal streets in Lemont, about one hundred feet north of the crossing of Stephens street by the tracks of the appellant. While standing there a beer wagon approached on Stephens street from the north, going on a trot toward the south in the direction of Hastings. Some of the boys called out to the driver if he were going to Hastings, and receiving an affirmative answer, but with no checking of the speed of the team, the appellee, and at least one other boy, started to get aboard the wagon, the speed of which was not diminished to accommodate them. The other boy succeeded in getting well aboard and up to the driver's seat. The wagon was rigged with stakes and chains, without solid sides or ends, and is spoken of as a "stake beer wagon." Appellee caught hold of stakes at the tail of the wagon, and had got so far aboard as to be standing upright on the wagon bottom and to have one or both his legs over the chain that extended from stake to stake; before the wagon had got across the railroad tracks, and while in that position a passenger train of the appellant coming from the west, and variously called the "Hummer," the "Flyer," and the "Limited," struck the hind part of the wagon, and threw appellee a distance of from sixty to seventy-five feet, causing him the very serious injuries for which he recovered the judgment of \$2,400 that is appealed from.

The declaration contained five counts, three of which charged appellant with negligence in failing to conform to the provisions of certain ordinances of the village of Lemont, but no evidence to support them was offered, and no reliance upon them is claimed by appellee.

The two remaining counts, first and second, alone, are relied upon to sustain the recovery. The first count charged the appellant with negligence generally in the operation of said train, and averred due care and diligence on the part of appellee, and in form and substance was clearly within the rule stated by this court in *Chicago City Ry. Co. v. Jennings*, 57 Ill. App. 376, affirmed in 157 Ill. 274.

It was not necessary to particularize the special act of carelessness that caused the accident, or, in other words, to plead the evidence. The negligence averred in the second count lay in the failure to ring the bell, or sound the whistle of the locomotive, at the distance of eighty rods from the crossing of the highway.

The appellant had placed and maintained gates on both sides of the railroad at the crossing, which the evidence tended to show was at times a busy one, but on the day in question such gates were not being operated or attended, and were in a position to indicate to anybody needing to pass that way that the crossing was open and safe against approaching trains. Appellant also kept a gateman there who operated the gates, when they were operated, by means of a cord or wire, but he was at the time of the accident about one hundred and fifty feet away from the crossing.

The driver of the wagon testified that he passed over the crossing every Sunday morning, and had before that time been stopped there by the gates being down when a train would be approaching. On this occasion, it is conceded the gates were up and unattended, and that there was no local indication or warning that the train was coming.

The testimony of one of appellant's witnesses, who was the first person to reach appellee, that he saw the flagman (gateman ?) leave his house and go toward the crossing before the accident, and that when he, the witness, got to the crossing the flagman was there, tends in some degree, although perhaps but slightly, to show that the gates were intended to be and would have been shut before the train arrived if the gateman had not been negligent and too slow in his duty.

The fact that it was on Sunday and that the business of the town was not active, can make no difference. There was evidence that the gates were operated on Sundays as on other days. Negligence or no negligence, at the time and under all the circumstances, was the question.

It is argued, however, in behalf of appellant, that although the appellant had prior to that morning operated the gates

at the crossing, it was, so far as shown by this record, purely a voluntary and gratuitous act, and not done in the discharge of any duty that appellant owed to the appellee under any ordinance or law; and that appellee had no right to presume that such operation would continue, but that appellant had a perfect right to suspend operation of the gates at any time it saw fit.

We can not concede that, although the gates were not maintained by requirement of ordinance or law, but were established voluntarily and gratuitously by the appellant, the appellant might arbitrarily without any attempt at notice to the public, and while leaving them in position indicating their purpose, suddenly suspend their operation and be exempt from negligence because of them, when, by their long use it had come to be known and understood by the appellee and the public generally that the gates, by their manner of operation, were a warning and safeguard to persons needing to go over the crossing.

The gates having been previously operated by a gateman, "for some years," as one witness testified, and having been there "for a couple of years or so," as said by another witness, and it not being denied that the gates were usually operated in the customary way, we regard it as being no more than expressive of a reasonable legal presumption to say that appellee, whose familiarity with the custom, location and surroundings is not questioned, had a right to rely upon the open gates as a notice to him that no train was close at hand, and as an invitation to him to make the crossing in safety, so far as an approaching train was concerned.

The negative of the other question, of whether the appellee was exercising due care and diligence for his own safety, is pressed with much force. That the appellee had the right to go over the crossing upon the beer wagon, or in any other reasonably prudent and cautious manner, is of course conceded. But it is said that he owed a duty to look out, and that if he had done so he would have seen the approaching train in abundant time to have avoided it. It

certainly was his duty to use every reasonable precaution, such as an ordinarily prudent person would employ before crossing the tracks at all, and that, too, whether the open gates invited him to come on or not. The question is, what would an ordinarily prudent person do under all the conditions and circumstances surrounding the appellee, including the circumstance that the gates were open, and the further circumstance, testified to by several witnesses, that the sound of no whistle or bell was heard by persons near to the place of the accident, and considering also the speed at which the train was moving across the highway?

One of the effects of the injury received by the appellee has been to deprive him of all recollection of the accident, and we are deprived of any testimony by him as to what he saw, heard or did. It is plain enough, from the testimony of others, what he did, and as to whether his conduct under the proved circumstances amounted to due care for his own safety became a question of fact for the jury, which they were better able to determine than we are, and it being a question about which ordinarily intelligent men, having a duty cast upon them, might reasonably differ upon, and there being evidence enough to leave the question one of considerable uncertainty, we have not the right to override the finding of the tribunal to whom the law has entrusted the determination of such matters. *C. & N. W. Ry. Co. v. Hansen*, No. 6844, last term.

There was no material error in the giving or refusing of instructions.

We observe no necessity for the discussion of anything else in the record, and the judgment will be affirmed.

City of Evanston v. David P. O'Leary.

1. *EMINENT DOMAIN—When Proceedings May Be Abandoned.*—A city may abandon condemnation proceedings before possession has been taken, but after it has taken possession of the land, with the consent of the owner, it becomes liable to pay a judgment rendered in such

City of Evanston v. O'Leary.

proceedings, and an action of assumpsit may properly be brought for the same.

2. *CITIES AND VILLAGES—Power of Council to Create Liability.*—Under Section 18, Art. 8, Chap. 24, R. S., the affirmative votes of seven members of a city council consisting of fourteen members, although they be a majority of those present, are not sufficient to bind the city upon any proposition that creates a liability against the city.

3. *SAME—Application of Sec. 13, Art. 3, Chap. 24, R. S.*—Where up to the time of the adoption of an order by a city council directing possession to be taken of property condemned for public use, no liability to pay the compensation existed against the city, and where all the acts of possession that followed the order were done in pursuance of the order and under no other right or authority—and the effect of such acts is to create a liability where none existed before, such an order is clearly within the spirit of Sec. 13, Art. 8, Chap. 24, R. S.

4. *SAME—Acts of Officer Under Void Order.*—The acts of an officer of a city in taking possession of property condemned for use as a street, where the officer had no such authority by virtue of his office, and acts only by virtue of an order of the city council, do not bind the city unless the order was a lawful one.

Assumpsit, on an award in condemnation proceedings. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and judgment here. Opinion filed May 6, 1897.

GEORGE S. BAKER, attorney for appellant.

To hold that the act of taking possession of the property of appellee condemned for municipal purposes is not an act creating liability against the city, is to reverse all of the holdings of the Supreme Court touching this subject. That was the express holding of the Supreme Court and of this court in *Chicago v. Barbian*, 80 Ill. 482; see *Chicago & N. W. Ry. Co. v. Chicago*, 148 Ill. 151; and *City of Chicago v. Hayward*, 60 Ill. App. 582.

MAHER & GILBERT, attorneys for appellee; JOHN MAYO PALMER, of counsel.

The mere taking possession of property for the purpose of a street, after the passage of a valid improvement ordinance, is clearly such a matter of detail and is of such purely administrative character that, if any action is required by the counsel to authorize it, such action is the appropriate

subject of an order or resolution as distinguished from an ordinance, and may, therefore, be lawfully taken by a majority of a quorum. *Shaub v. City of Lancaster*, 26 Alt. Rep. 1067; *Fairchild v. St. Paul*, 49 N. W. Rep. 325; *Rushville Co., etc., v. Rushville*, 23 N. E. Rep. 72.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In a condemnation proceeding instituted by the appellant for opening, widening and extending a street, the appellee was awarded \$8,925 as compensation for the taking and damaging of certain premises in which he held a leasehold interest, and a judgment of condemnation was duly entered.

After the award and judgment were had, and on April 30, 1895, the appellant repealed the ordinance, and the proceedings in condemnation were dismissed and all orders therein vacated by the court in which they were had.

This suit in assumpsit was begun upon such judgment upon the theory that possession of the condemned property had been actually taken by appellant, and the appellee having recovered, this appeal comes.

The correctness of the recovery turns upon the mixed question of law and fact, whether the appellant, with the consent of the appellee, took actual possession of appellee's property that was condemned.

If such possession were taken the recovery was rightful. *City of Chicago v. Shepard*, 8 Ill. App. 602; *Rice v. City of Chicago*, 57 Ill. App. 558; *City of Chicago v. Hayward*, 60 Ill. App. 582, and cases therein cited.

The facts claimed by appellee to constitute the taking of possession by the appellant are alleged in the declaration, as follows:

"And the plaintiff avers that on, to wit, the 9th day of October, 1894, the said defendant duly passed a resolution by its common council directing its commissioner of public works to immediately take actual and physical possession of all the plaintiff's said interest in said above described real estate, and that thereafter, to-wit, on the 10th day of

October, 1894, the said commissioner of public works took actual and physical possession of the plaintiff's said leasehold estate, under and by virtue of said resolution, and such condemnation ordinance, proceedings and judgment, with the consent of the plaintiff, for the purposes set forth in said ordinance, petition and proceedings.

And the plaintiff avers that said judgment, by reason of said defendant taking actual and physical possession of the plaintiff's interest in said real estate, and with the consent of the said plaintiff, became absolute."

The city council of appellant consisted of fourteen aldermen and the mayor, and the resolution referred to in the declaration, and introduced in evidence, received seven votes and was declared adopted by the mayor *pro tem*.

Section 13, Art.3, Chap. 24, entitled "Cities, Villages and Towns," Rev. Stat., Ill., provides:

"The yeas and nays shall be taken upon the passage of all ordinances, and on all propositions to create any liability against the city, * * * and the concurrence of a majority of all the members elected in the city council shall be necessary to the passage of any such ordinance or proposition."

Although less than fourteen aldermen were present and voting, the quoted section of the statute requires the concurrence of a majority of the fourteen "elected" members, and in our opinion no resolution adopted by a less number than a majority of fourteen, which seven manifestly was not, could bind the city upon any proposition that created a liability against the city. *City of San Francisco v. Hazen*, 5 Cal. 169.

We do not mean to be understood that there can be no taking of possession of condemned property by a city, such as will render the city liable for the compensation that may have been awarded in condemnation proceedings, except it be done by, or in pursuance of, legislative action by the city council. But where, up to the time of the adoption of an order by the council directing possession to be taken, no liability to pay the compensation existed against the city, and where, as here, all the acts of possession that followed

the order were done in pursuance of the order and under no other right or authority, and the effect of such acts would be to create a liability where none existed before, then, in such case an order of the kind relied upon here would be clearly within the spirit, if not the letter, of the restrictive clause of the statute.

The commissioner of public works, who went upon the premises with the appellee, went there in pursuance of the authority of the order in question, and his conduct constitutes everything, beyond the order itself, which is claimed amounted to taking possession. He had no authority by virtue of his office to take possession of the premises, and especially none where if by so doing a liability of the kind claimed by this suit would be created. *City of Chicago v. Shepard, supra.*

And acting only by virtue of the order his acts would not bind the city unless that order was a lawful one.

Up to the time of the purported adoption of the order in question there was nothing but a conditional judgment against the city, from which the city could become entirely relieved by abandonment of the proceedings in which the judgment was rendered, as was subsequently done. To change that condition into an absolute liability by the city to pay the amount of the judgment was to create a liability against the city, to do which required the concurring vote of more of the aldermen than was had in this case.

The order was an invalid one and conferred no lawful power upon the commissioner of public works to take possession of the property, even though we assume that what he did would have amounted to taking possession by the city had he been lawfully directed to do what was done by him. A motion to strike out the bill of exceptions was reserved to the hearing, and upon the authority of *Railway Passenger and Freight Conductors Mut. Ben. Ass'n v. Leonard*, 166 Ill. 154, followed by us in *Scott v. Schnadt* (70 Ill. App. 25, it will be denied.

Because no possession was taken by appellant, the judgment of the Circuit Court will be reversed, and judgment for the appellant will be entered here.

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Union Insurance Co. v. Marjorie H. Crosby, Adm'r, etc.

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1. APPELLATE COURT PRACTICE—*Insufficient Bill of Exceptions.*—Where the bill of exceptions does not show that any exception was taken to either the finding of the court, the overruling of the motion for a new trial, or the judgment, there is nothing presented upon which the Appellate Court can act.

2. PRACTICE—*Exceptions Must Be Taken.*—Although a cause is tried by the court without a jury, unless an exception is taken to the finding, its correctness can not be questioned by an Appellate Court.

3. SAME—*Exceptions to the Overruling of a Motion for a New Trial.*—The making and overruling a motion for a new trial does not take the place of exceptions unless the overruling of such motion is excepted to.

Assumpsit.—Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

HAMILTON & STEVENSON, attorneys for appellant; HOOD GILPIN and ADELBERT HAMILTON, of counsel.

W. E. HUGHES, attorney for appellee; D. J. SCHUYLER and THOS. L. HUMPHREVILLE, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit in which, a jury having been waived, there was a finding and judgment by the court for the defendant.

The merits of the case seem to be with appellee.

The bill of exceptions does not show that any exception was taken to either the finding of the court, the overruling of the motion for a new trial, or the judgment. The record therefore presents nothing upon which we can act. Kennedy, Adm'r, v. Ill. Cent. Ry. Co., First Dist. Ill. App., filed Feb. 9th, 1897; St. L., A. & T. H. R. R. Co. v. Dorsey, 68 Ill. 326; Brown v. Clement, 68 Ill. 192; Seibel v. Vaughan, 69 Ill. 257; Trustee v. Meisenheimer, 89 Ill. 151; Grimes v. Butts, 65 Ill. 347.

Although a cause is tried by the court without a jury, unless an exception is taken to the finding, its correctness can not be questioned by an appellate court. *Sherman v. Skinner*, 83 Ill. 584; *Duncan v. Chandler*, 5 Ill. App. 499.

Nor does the making and overruling of a motion for new trial take the place of exceptions unless the overruling of such motion be excepted to. *Duncan v. Chandler, supra*; *Brooks v. The People*, 11 Ill. App. 422.

The judgment of the Circuit Court is affirmed.

Mary Delaney v. Daniel Delaney.

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1. **BENEFIT SOCIETIES—*Change of Beneficiary.***—During his life a member of a mutual benefit society may change his beneficiary in any way not prohibited by general law, or by the charter or by laws of the society, or by the terms of the certificate.

2. **SAME—*When Vested Rights Accrue.***—In mutual benefit societies the contract of insurance is between the society and the member, and the beneficiary acquires no vested right in the benefit fund which is to accrue upon the death of the member, until such death takes place.

3. **SAME—*Mode of Changing the Beneficiary.***—Where the mode of changing the beneficiary named in the certificate of a benefit society is specified in the contract or certificate such mode must be substantially pursued; but the rule has its qualifications.

4. **SAME—*Change of Beneficiary—New Contract.***—When the parties, the society and the member, agree that a transaction between them is to be treated as a surrender of the existing certificate, and a new one with a new beneficiary is issued, a new contract is made and the old one abandoned and suspended, although the old certificate may be in the possession of the original beneficiary and out of the power of the member to surrender.

Bill of Interpleader.—Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

JAMES E. WHITE and B. F. MOSELEY, attorneys for appellant; WARD B. SAWYER, of counsel.

A life insurance policy is a chose in action and can be assigned by a delivery like any other chose in action; and a

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delivery of the policy for the purpose of assignment will operate without any writing. 2 Parsons on Contracts (8th Ed.), 597; Palmer v. Merrill, 6 Cush. (Mass.), 286; 2 May on Ins. (3d Ed.), Sec. 389, 395; Cook v. Black, 1 Hare (Ch.), 390; 2 Schouler's Personal Property (2d Ed.), Sec. 72; Niblack on Ben. Soc. and Acc'd Ins. (2 Ed.), Sec. 167 and note.

FRANCIS T. COLBY, attorney for appellee.

The rights of appellee are not impaired by the amendatory statute approved June 22, 1893 (Laws of 1893, 117). Kersten v. Voigt, 61 Ill. App. 42; 164 Ill. 314.

The charter providing that widows, orphans, heirs and devisees might be beneficiaries, appellee was qualified to be a beneficiary. Martin v. Stubbings, 126 Ill. 388; Bloomington Mut. Ben. Ass'n v. Blue, 120 Ill. 121; Laws of 1871-2, 296; Laws of 1873-4, 74; Rockhold v. Canton, Mass. Mut. Ben. Soc. 129 Ill. 440.

Appellant had no vested interest under first certificate; it being issued by a mutual benefit society the contract was with the member and not with the beneficiary. Martin v. Stubbings, 126 Ill. 388; Sup. Council v. Franke, 34 Ill. App. 651, 137 Ill. 118; Conyne et al. v. Jones, 51 Ill. App. 17; Benton v. Brotherhood, 146 Ill. 570.

Where the contract of mutual benefit insurance does not take away the power to change the beneficiary, the member has the right. Benton v. Brotherhood, 146 Ill. 570; Johnson v. Van Epps, 110 Ill. 551; Niblack Ben. Soc. (1894 Ed.), 407, Sec. 212; Highland v. Highland, 109 Ill. 16.

The delivery of the certificate to the beneficiary named herein has no effect whatever upon the right of the member to change the designation, as provided in the contract of insurance, and this though the possessor of the certificate has paid the assessments. Masonic Ass'n v. Bunch, 109 Mo. 560; Fisk v. Eq. Aid Union (Pa.), 11 Atl. Rep. 84; Brown v. Grand Lodge, 80 Iowa, 287; Hirschl v. Clark, 81 Iowa, 200; Isgrigg v. Schooley, 125 Ind. 94.

Among successive equities otherwise equal, and also between a legal title or superior equitable interest earlier in time and a subsequent equity, the holder of the interest which is prior in time and would be prior in right may lose his precedence and be postponed by his negligence. No actual fraudulent intent is essential. When one keeps silent and does not announce his title to an innocent person who is making expenditures or advancing money upon the supposed security of the property, his *laches* constitute an equitable estoppel. 2 Pomeroy's Eq. Juris. (2d Ed.), Sec. 731, and cases cited in note 1; Reiss v. Hanchett, 141 Ill. 419; Eldridge v. Walker, 80 Ill. 270.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a bill filed by the High Court Independent Order of Foresters to require the appellant and appellee to interplead and settle between themselves their respective claims to \$1,000, admitted by the order to be due and owing from it upon an endowment certificate payable upon the death of Martin Delaney, a member of said order, who died October 25, 1893. The appellant was the wife of the member, Martin Delaney, and the appellee was his remote relative.

The original endowment certificate was issued November 14, 1882, and was made payable "to Mary Delaney, his wife." Such certificate was delivered by the order to Martin Delaney, the member, and by him delivered to the appellant, his wife, about the time it was issued, and it remained continuously in her possession from that time until the bill was filed.

January 6, 1887, Martin represented to the order that he had lost such certificate, and requested that a new one be issued to him, payable to the Mercy Hospital, which was done, without a surrender in fact of the original certificate. Subsequently, on July 24, 1888, Martin surrendered to the order the certificate which was payable to the Mercy Hospital, and requested that a new certificate be issued payable

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“to Daniel Delaney (the appellee), his cousin,” which was done.

The contest is between the appellant, as holder of and as the person named in the original certificate, and the appellee, as holder of and as the person named in the last certificate.

There was evidence that the original certificate was taken out and delivered by Martin to his wife in consideration of her past support of him, and of moneys that she had furnished or loaned to him—some \$400 being so furnished or loaned before their marriage—and that she paid his initiation fee of about \$7 when he took out the certificate for her benefit, and that she agreed with him to pay all dues and assessments that should be asked of her. There is no evidence that any subsequent dues or assessments were ever asked from her, although she testified that she “kept up the dues and assessments as I (she) agreed with my (her) husband, and paid all that I (she) had any notice of.”

From the time the last certificate payable to appellee was issued, he, the appellee, paid all dues and assessments until Martin's death, and in so doing, and in the matter of Martin's board at the hospital and his funeral expenses, appellee paid out from \$250 to \$300 for Martin.

When Martin procured the issuance of the certificate payable to Mercy Hospital, he furnished to the order his affidavit that the original certificate had been “either lost, destroyed or stolen.” Such affidavit was not true, and was probably known by Martin to be false, for there is evidence that Martin asked his wife for the certificate, and that she refused to give it up.

The appellant testified that Martin told her that appellee had asked him to make over the certificate to him, and that he at first told her he was not going to do it, but subsequently told her he had done so. Her only reply to such information was by way of asking Martin why he did so, to which he answered that he was drunk and did not know what he was doing. She does not appear to have ever claimed any further right under the certificate until after Martin's death.

There was no evidence that the order ever made inquiry of the appellant for the original certificate, or gave or attempted to give her any notice that Martin had applied for a new certificate to take its place, or that such new one would be or had been issued payable to a different person than herself. The order seems to have acted wholly upon the sworn statement of Martin that the original certificate was lost or destroyed when it issued the new one payable to the hospital, and upon the actual surrender of that one when it issued the last one payable to the appellee. The original certificate, after reciting that it was issued to Martin upon certain stated conditions, contained the following:

"These conditions being complied with, the said High Court of the I. O. F. of Illinois, hereby promises and binds itself to pay to Mary Delaney, his wife, one thousand dollars upon satisfactory evidence of the death of said member and upon the surrender of this certificate, provided that said member is in good standing in this order at the time of his death, and provided also that this certificate shall not have been surrendered by said member and another certificate issued at his request in accordance with the laws of the order."

And each of the subsequent certificates was exactly the same, except in the name and description of the beneficiary.

We have stated sufficient of the facts, although not all of them, to show what the question of law is that arises in the case, viz.: Was the original certificate annulled and the appellant deprived of her right to the fund by what was subsequently done without her knowledge or consent?

In mutual benefit societies the contract of insurance is between the society and the member, and the beneficiary acquires no vested right in the benefit fund which is to accrue upon the death of the member, until the death takes place. Niblack on Benefit Societies (2d Ed.), Sec. 212.

And it would seem, therefore, to follow that during his life the member may change his beneficiary in any manner not prohibited by general law, or the charter or by-laws of

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the society, or by the certificate itself. *Voigt v. Kersten*, 164 Ill. 314. Where, however, a mode of changing the beneficiary be specified in the contract or certificate it should be substantially pursued. *Ibid.* Sec. 218.

But even in such a case the rule has its qualifications. *Ibid.* Sec. 219.

In this case there does not appear to have been any express provision for changing the beneficiary; at least we have been pointed to none. Undoubtedly the order would be required to issue a new certificate payable to a new beneficiary whenever it should accept a surrender of the former certificate, but not otherwise. What shall constitute such a surrender and acceptance of surrender must, in the absence of express provision, be left to the parties to the certificate—the order and the member—to agree upon. The beneficiary, having no vested interest in the certificate until after death of the member, is, in our opinion, without legal right to interfere. And when the parties to the contract—the order and the member—agree that a transaction between them is to be treated as a surrender of the old certificate, and a new certificate is issued with a new beneficiary, a new contract comes into force and the old one becomes abandoned and superseded.

It does not seem that the mere manual surrender of a certificate should be required if the parties elected to dispense with it. The provision of the contract that the fund would be paid to the beneficiary named upon a surrender of the certificate (by the beneficiary) provided that the certificate should not have been sooner surrendered by the member, would seem to contemplate the case of a member who had delivered his certificate to the beneficiary and could not control its manual possession, but who nevertheless had effected a legal surrender of it and obtained another certificate in favor of a different beneficiary. At any rate, we can not conceive any principle existing in the theory of mutual benefit insurances that will give to the holder and beneficiary of a former certificate the power of preventing the member and society from making a new contract naming a different beneficiary. To admit such, would be to acknowl-

edge the existence of a vested interest by a beneficiary in the contract during the lifetime of the member and from the moment of the making of the contract, which we understand no authority sustains.

Nor can the appellant sustain her right to the fund upon any principle applicable to gifts or general contracts. But we will not discuss the case further, except to add that it possesses features of considerable collateral importance which it would be desirable to have settled by the Supreme Court.

The decree of the Circuit Court is affirmed.

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79	685
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82	386

John E. Harper et al. v. L. B. Dixon et al.

1. PLEADING—*Proper Designation of Parties*.—Upon an instrument for the payment of money signed by persons as “directors of,” etc., it is proper to allege that the signers, by the name and style of the “directors of,” etc., promised to pay, etc., and such allegation can not be denied under pleas not sworn to.

2. APPELLATE COURT PRACTICE—*Abstract Must Show Upon What Errors are Based*.—Alleged errors not based upon anything appearing in the abstract of the record will not be considered by the court. *Shively v. Hettinger*, 67 Ill. App. 278.

Assumpsit, on an instrument in writing. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1897. Opinion filed May 6, 1897.

SOANLAN & MASTERS and J. E. RICKETTS, attorneys for appellants.

W. A. SHERIDAN, attorney for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract does not show who were plaintiffs or defendants in the Superior Court, nor who are appellants or appellees here—for or against whom any judgment was rendered, nor what kind of declaration was filed.

Harper v. Dixon.

We guess that a suit was commenced by L. B. Dixon and William J. Brooks against John E. Harper, S. A. McWilliams and Silas T. Yount, upon an instrument in the words and figures following:

"March 23, 1893, the directors of the Clinical College of Medicine & Specialty Hospital, through its officers, agree to pay to Messrs. Dixon & Brooks for their services on the buildings located on Wabash avenue and Eda street, as follows: \$1,000 in thirty days; \$1,000 in sixty days; \$1,000 in ninety days; \$2,000 in stock at par when roof is on; \$2,000 in stock at par when building is completed.

Signed: J. E. HARPER,
S. A. McWILLIAMS, M. D.,
Sec'y and Director.
SILAS T. YOUNT."

Which said instrument was indorsed with these words:

"We agree to the above terms in full of all demands.

Signed: DIXON & BROOKS."

A proper declaration upon that instrument would allege that the signers of it, "by the name and style of the directors of the Clinical College of Medicine & Specialty Hospital," promised to pay Dixon & Brooks; and such allegation could not be denied under any pleas not sworn to. *Dwight v. Newall*, 15 Ill. 333; *Neteler v. Culies*, 18 Ill. 188; *Frankland v. Johnson*, 46 Ill. App. 430.

The opinion of the Supreme Court in the last case, as reported in 147 Ill. 520, seems to us to be in conflict with its earlier judgments, but there is no intimation that it was intended to overrule or modify them. No sworn plea is shown by the abstract, and all presumptions being in favor of the correctness of the judgment, we must presume that the pleading; were such that no issue whether the appellants were promisors was presented.

There seems to have been considerable work done by the appellees at the request of the appellants, in making sketches and plans, though no building was done. It is not probable, from the evidence shown by the record, that in such request anything was said about corporate or individual liability,

and the law will generally imply individual liability from a request when nothing is said as to who will pay.

Upon the evidence the verdict of the jury for the appellees does not appear unwarranted.

The abstract does not show that the appellants excepted to any instruction given, or requested any to be given; nor that any motion for a new trial is mentioned in the bill of exceptions.

Very little attention is paid to the frequent decisions that courts will not go beyond the abstract to find errors. *Shively v. Hettinger*, 67 Ill. App. 278. The judgment is affirmed.

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James Pease v. The L. Fish Furniture Co.

1. STATUTES—*Grammatical Accuracy in Construing*.—In construing statutes, grammatical accuracy is not so much to be sought for as the intent and purpose of the enactment.

2. CHATTEL MORTGAGES—*For Purchase Money*.—Section 34, Chapter 95, R. S., entitled "Mortgages," providing that no chattel mortgage executed by a married man or woman on household goods shall be valid unless joined in by the husband or wife, has no application to a mortgage given to secure the purchase money of the goods upon which it is given. *Paterson v. Higgins*, 58 Ill. App. 268, followed.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

[NOTE.—*The memorandum made by the justice before whom the mortgage was acknowledged, held sufficient by the court, was as follows:*

"Chattel Mortgage,
Dated Sept. 12, 1894.
Consideration \$800.00.

{ Mrs. Abby Pinkston
to
L. Fish.

Ack'd and ent'd Sept. 14, 1894.

3 chamber suits, 8 folding beds, 1 dresser, 3 toilet dresser, 3 matt., 2 cheffoniers, 3 springs, 1 center table, 1 center table, 1 6-foot extension table, 2 center tables, 10 pair pillows, 1 pair curtains, 10 comforters, 1 Laurel range, pipe, furniture and water front, No. 1408 Wabash Av."]

S. W. McCASLIN, attorney for appellant.

HOFHEIMER & PFLAUM, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellee, "a regular dealer on the so-called installment plan," sold to a married woman a quantity of furniture, taking as security therefor a chattel mortgage upon the property so sold; the mortgage was executed by the purchaser alone, her husband not joining therein, which mortgage was duly acknowledged and recorded.

Thereafter, judgment having been obtained against the purchaser, a levy was made upon the mortgaged property; whereupon appellee replevied said furniture.

We have in *Patterson v. Higgins*, 58 Ill. App. 268, passed upon the question here presented. To the ruling in that case we adhere.

Appellant urges that the grammar of the chattel mortgage statute is opposed to the construction we have put upon that act.

In construing statutes, grammatical accuracy is not so much to be sought for as the intent and purpose of the enactment. *Endlich on Construction of Statutes*, Sec. 113.

The memorandum made by the justice before whom the mortgage was acknowledged was sufficient. *Crescent Coal and Mining Co. v. Raymond*, 57 Ill. App. 197. Affirmed.

High Court of the Independent Order of Foresters v. Lillie Schweitzer.

1. **INSURANCE—False Statements in the Application.**—An applicant for insurance, as to his employment stated that he was "managing a restaurant, etc.;" on the trial it appeared that he was not the manager of the restaurant but a barkeeper in it. *Held*, that the keeping of a restaurant is so commonly connected with the selling of liquors and the keeping of a bar that the statement "managing a restaurant, etc." would convey to the ordinary mind that the applicant among other things sold liquors or tended bar.

2. **WORDS AND PHRASES—Et cætera.**—The phrase *et cætera*, for which etc. is an abbreviation, imports other purposes of a like character to those which have been named.

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Assumpsit, on a policy of life insurance. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. **Affirmed.** Opinion filed May 6, 1897.

STATEMENT OF THE CASE.

This is an appeal from the Circuit Court of Cook County to reverse a judgment rendered against the appellant in favor of the appellee for \$3,000 and costs, in an action of assumpsit on a life insurance policy.

On the 18th day of January, A. D. 1892, Charles Schweitzer, the husband of appellee, made application for membership in Court Sedgwick, No. 176, of the Independent Order of Foresters, of the State of Illinois, and became a member of appellant, and was insured by it in the sum of \$1,000, and continued in said relation with appellant until the 1st day of August, A. D. 1895, when he surrendered and returned to appellant the endowment certificate, and directed that a new one be issued to him payable to appellee, his wife, for \$3,000. In making an application for an increase of endowment on July 9, 1895, he signed a written application for an increase of endowment, in which application he answered certain questions propounded by the medical examiner making such examination, as follows: "Q. What class of business are you engaged in? A. Restaurant manager. Q. State fully the duties of your employment. A. Managing a restaurant, etc." At and for a considerable period before that time, he was engaged in a saloon and restaurant kept by one Charles Holstrom, at 93 E. Washington street, Chicago. He had sole control and charge of the place, in the absence of the proprietor; he bought goods for the restaurant and saloon, paid bills, hired and paid help and "tended" bar from 8 A. M. to 8 P. M. six days in the week. He continued in such employment up to the time of his death.

In section 2 of article 16 of the constitution and by-laws of the high and subordinate courts of appellant, it is provided that saloon keepers and bar tenders, together with individuals engaged in certain other occupations, shall be

eligible for membership in said order, in what is known as the "Hazardous Risk Class," and there is also provided for members insured in said class a special rate of assessment, differing materially from the rates fixed for members insured in the ordinary risk class.

Schweitzer continued a member of said appellant, and was by it insured for \$3,000 in the ordinary risk class, and paid therefor the amount of assessments required of members belonging to said class until the 13th day of November, A. D. 1895, when he departed this life.

STEDMAN & SOELKE, attorneys for appellant.

A warranty is a stipulation inserted in writing on the face of the policy on the literal truth or fulfillment of which the validity of the entire contract depends. *Ripley v. Ætna F. Ins. Co.*, 30 N. Y. 157; *Angell on Insurance*, Sec. 140; *Bacon on Benefit Societies and Life Insurance*, Vol. 1, Sec. 194.

Where the policy of insurance recites that the statements made in the application were warranted to be true and the basis of the contract, such statements are considered as warranties. *Prov. Sav. L. Asso. Soc. v. Reutlinger*, 25 S. W. Rep. 835; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 482; *Thomas v. Fame Ins. Co.*, 108 Ill. 92; *Ripley v. Ætna Insurance Co.*, 30 N. Y. 136; *Foley v. Roy Arc.*, 28 N. Y. Supp. 952.

Where the application is expressly declared to be a part of the policy it becomes a part of the contract, and if the statements therein made by the applicant are warranted to be true, their falsity will bar a recovery on the policy. *Grand Lodge of O. U. W. v. Jesse*, 50 Ill. App. 101; *Royal Tem. of Temperance v. Curd*, 111 Ill. 234; *High Court I. O. F. v. Zak*, 136 Ill. 187; *Continental L. Ins. Co. v. Rogers*, 119 Ill. 482; *Bacon on Ben. Soc. and L. Ins.*, Vol. 1, Sec. 196, and cases cited; *Bartean v. Phoenix Mutual Life Ins. Co.*, 67 N. Y. 595; *Ripley v. Ætna Ins. Co.*, 30 N. Y. 136.

And such statements will be deemed material, whether so in fact or not, and their falsity will avoid policy however innocently made, notwithstanding they may have no agency

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in causing the loss or producing the death of the insured. *Thomas v. Fame Ins. Co.*, 108 Ill. 92; *Con. L. Ins. Co. v. Rogers*, 119 Ill. 482; *Ripley v. Aetna L. Ins. Co.*, 30 N. Y. 136; *Bartean v. Phoenix L. Ins. Co.*, 67 Id. 595.

The courts have no other alternative than to give effect to the contract of the parties. 12 Cush. 423; 59 Am. Dec. 192.

Where applicant represented his occupation to be that of a printer, when in fact he was tending bar, such misrepresentation exonerates the insurer. *Holland v. Supreme Council C. O. F.*, 25 Atl. Rep. 368; *Dwight v. Ger. L. Ins. Co.*, 103 N. Y. 341; 8 N. E. Rep. 654.

FITCH & DUHA, attorneys for appellee.

It does not necessarily follow that every statement contained in an insurance policy is to be deemed a warranty, although it be declared to be such in terms. *Continental Life Ins. Co. v. Thoena*, 26 Ill. App. 495; *Continental Life Ins. Co. v. Rogers*, 119 Ill. 474.

Forfeitures are odious to the law, and in enforcing them courts should never search for that construction of language which must produce a forfeiture when it will bear another reasonable construction which will not produce such a result. *Hartford Fire Ins. Co. v. Walsh*, 54 Ill. 165.

The laws and rules of the association should be liberally construed to promote its benevolent object. *Union Mut. Acc. Assn. v. Frohard*, 134 Ill. 228; *Alexander v. Parker*, 42 Ill. App. 455.

MR. JUSTICE WATERMAN' DELIVERED THE OPINION OF THE COURT.

It is urged that the deceased made untruthful answers upon his application for an increase of his insurance. The answer as to his employment was, that he managed a restaurant, etc. The keeping of a restaurant is so commonly connected with the selling of liquors and the keeping of a bar, that the statement "managing a restaurant, etc.," would, to the ordinary mind, convey the idea that applicant, among other things, sold liquors or "tended" bar.

Traders Ins. Co. v. Northern Pacific Express Co.

The phrase *et cætera*, for which etc. is an abbreviation, imports other purposes of a like character to those which have been named. *Noscitur a sociis*. James Schouler, petitioner, 134 Mass. 427; Hayes v. Wilson, 105 Mass. 21; Am. and Eng. Ency. of Law, Vol. 7, 35; Gray v. Central Ry. Co., 11 Hun, 70.

If appellant desired a more definite statement it should have asked for it.

There was neither concealment nor misrepresentation.

It appears that before the endowment certificate had been delivered, the attention of Court Eureka No. 8, to which the insured belonged, was called to his application, and it was then stated in open meeting by Mr. Peters, one of the members, that Charles Schweitzer was, to the best of the knowledge of the speaker, not the manager of the restaurant, but a barkeeper; that he, Peters, "took dinner there every day."

Such evidence was admissible as bearing upon the question of whether the insured had by his application deceived appellant, and that its action in issuing the certificate and receiving payment therefor had been based upon a misunderstanding.

The judgment of the Circuit Court is affirmed.

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Traders Insurance Co. v. The Northern Pacific Express Co.

1. **INSURANCE—Construction of Policies—Ambiguities.**—Insurance policies are construed against the party by whom they are issued. If ambiguous the doubt will be resolved against the insurer.

2. **CONSTRUCTION—Of Contracts.**—All contracts are to be construed so as to effectuate the intent of the parties.

3. **CONTRACTS—A Contract Construed.**—When an insurance company issued a policy insuring an express company against loss or damage by fire, on express matter and accrued charges on same, only while contained in cars while in transit upon lines owned, leased or operated by

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the Northern Pacific Railroad Co., *it was held*, that the policy was intended to apply to future events; that the contract of insurance was made with reference to losses that might happen subsequent to the time it was entered into, and covered property in transit in cars at any time within the period of its duration.

Assumpsit, on a policy of insurance. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

STATEMENT OF THE CASE.

Appellant issued to appellee a policy of the following import:

"THE TRADERS INSURANCE COMPANY OF CHICAGO, ILL.
No. 019,322. \$48,000.

In consideration of four hundred and eighty dollars do insure Northern Pacific Express Co. against loss or damage by fire to the amount of forty-eight thousand dollars (\$48,000), on express matter and accrued charges on same, only while contained in cars while in transit upon lines owned, leased or operated by the Northern Pacific Railroad Co., loss not to exceed \$4,800 in any one car. It being agreed and understood that this insurance covers against loss by fire only on express matter of every description and kind owned by the assured, as well as their liability as common carriers, but this insurance shall not apply to express matter in cars while the same are in any building.

To attach to policy No. 019,322, Traders Insurance Co.
Other insurance permitted.

R. J. SMITH, Secretary.

Against all such immediate loss or damage sustained by assured as may occur by fire to the property herein stated, not exceeding the sum insured, nor the interest of assured therein, except as hereinafter provided, from the twenty-fourth day of March, 1893, at 12 o'clock noon, to the twenty-fourth day of March, 1894, at 12 o'clock noon, the said loss or damage to be estimated, etc., * * * and to be paid sixty days after the written notice and proofs, etc.

* * * (various provisions in regard to application and survey, other insurance, title," etc., etc.)

The declaration filed in this case sets forth that on October 15, 1893, plaintiff had in its possession certain express matter owned by it, and certain other express matter and other property which it was then and there transporting as a common carrier, all in one certain car, and was then and there entitled to certain charges for the transportation thereof, and while said property was contained in said car while said car and said property were in transit upon a line, to-wit, a line of railroad which at the date of the execution of said policy of insurance was leased and operated by the Northern Pacific Railroad Company, and while said car was not in any building; and on, to-wit, said 15th day of October, 1893, said property was then and there destroyed by fire; that at the time of making said policy, and from thence until the happening of the loss and damage hereinbefore mentioned, it, the said plaintiff, had an interest in the said property, and in accrued charges thereon, to the amount of the said sum so by the defendant insured thereon as aforesaid, etc. * * *

Various averments concerning notice, proof of loss, etc., and usual ending.

To this appellant filed a general demurrer, which being overruled, defendant elected to stand by its demurrer whereupon judgment in favor of plaintiff was entered, and its damages were assessed at \$3,361. From which judgment the defendant appealed.

DUPRE, JUDAH, WILLARD & WOLF, attorneys for appellant.

K. K. KNAPP, attorney for appellee.

When a policy is fairly susceptible of two different constructions, that one will be adopted which is most favorable to the insured.

This is announced as the general rule in the text-books; and has been specifically adopted by the courts of many States. 1 Beach on Insurance, 549.

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"The sole object of insurance being indemnity against loss, any ambiguity in the policy will be resolved against the insurer so as to effectuate that purpose. If the words employed in a contract of insurance themselves, or in connection with other language used in the instrument, or in reference to the subject-matter to which they relate, are susceptible of the interpretation given them by the assured, although in fact intended otherwise by the insurer, the policy will be construed in favor of the assured." May on Insurance, 3d Edition, Sec. 175; *Thompson v. Phoenix Ins. Co.*, 136 U. S. 287; *DeGraff v. Queen Ins. Co.*, 38 Minn. 501; *Western & Atlantic Pipe Lines v. Home Ins. Co.*, 22 Atl. 665; *McKeesport Machine Co. v. Ben Franklin Ins. Co.*, 173 Pa. St. 53; *Niagara Fire Ins. Co. v. Scammon*, 100 Ill. 644; *Healy v. Mut. Accident Association*, 133 Ill. 556; *Union Mut. Accident Ass'n v. Frohard*, 134 Ill. 228; *Travelers Ins. Co. v. Dunlap*, 160 Ill. 642; *Met. Accident Ass'n v. Froiland*, 161 Ill. 30; *Getman v. Guardian Fire Ins. Co.*, 46 Ill. App. 489; *Fireman's Fund Ins. Co. v. Western Ref. Co.*, 55 Ill. App. 329.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Insurance policies are construed against the party by whom they are issued. If a policy be ambiguous, the doubt will be resolved against the insurer. 1 *Beach on Insurance*, 549; *May on Insurance*, 3d Ed., Sec. 175; *Getman v. Guardian Fire Ins. Co.*, 46 Ill. App. 489; *Fireman's Fund Ins. Co. v. Western Refrigerator Co.*, 55 Ill. App. 329.

All contracts are to be reasonably construed so as to effectuate the intent of the parties thereto.

Appellee has furnished us with the following as illustrating the ambiguity it finds in the policy :

"The Traders Insurance Company * * * do insure the Northern Pacific Express Company against loss or damage by fire to the amount of forty-eight thousand dollars (\$48,000) on express matter and accrued charges on same only | while contained in cars | while in transit upon lines

[^{now}_{then}] owned, leased or operated by the Northern Pacific Railroad Company." As to which appellee says: "An effort is made above, as will be noted, to indicate graphically the contentions of the parties in this case, by separating certain of the phrases from each other and by interpolating the two words in brackets.

The declaration states that the loss occurred while the express matter was on a line of railroad which, at the *date* of the *execution* of the policy, was leased and operated by the Northern Pacific Railroad Company. It does not state that the line of railroad upon which the loss occurred was 'owned, leased or operated' by the Northern Pacific Railroad Company *at the time of the loss.*"

We regard the meaning of the policy to be clear, and that there is no need for an interpolation of either "now" or "then."

It is manifest that the policy under consideration was intended to apply to future events. The contract was made with reference to losses that might happen subsequent to the time it was entered into.

It was to cover property in cars in transit, etc., at any time from the 24th day of March, at noon, 1893, to the 24th day of March, at noon, 1894.

It was not confined to property at the time of the execution of the contract (now) in cars, or limited to property in cars at the making of the agreement (now) in transit, but applied to property between the 24th day of March, 1893, and the 24th day of March, 1894, in transit.

The phraseology of the policy is like that of one covering the stock of a merchant, and its meaning is the same.

"One thousand dollars on stock of groceries contained in store 456 Randolph street, from March 24, 1893, to March 24, 1894," means not *the* stock, the articles (now) contained, but any stock that may be in the store between the dates named.

The expressed goods covered by the policy under consideration, like the goods of a merchant, are continually changing. The policy was not designed as an indemnity

against loss of goods in transit when it was made, but against loss during the described year that might happen in cars while on lines owned, leased or operated by appellant, not while in cars on lines that were at the time of the execution of the policy owned, leased or operated by appellant. Neither the date of the policy nor the time at which it was executed is set forth in the declaration; while therefrom it does appear that the insurance was from March 24, 1893, to March 24, 1894, "on express matter" "only while contained in cars while in transit upon lines owned, leased or operated" by appellant.

The case of *Red Wing Mills v. Mercantile Ins. Co.*, 19 Fed. Rep. 115, is analogous to the present. See also *Farmers Mut. Fire Ins. Assn. v. Kryder*, 31 N. E. Rep. 851; *Towne v. The Fire Assn. of Philadelphia*, 27 Ill. App. 433, and *Bradbury v. Fire Ins. Assn.* 15 Atl. Rep. 34.

The judgment of the Circuit Court is reversed and the cause remanded.

George Hinchliff and Edward Harlan v. Joseph Rudnick.

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1. **PLEADING—*Allegations of Duty.***—An allegation that a certain line of conduct was a duty is superfluous. If from the facts stated, the law implies a duty, the charge is sufficient.

2. **SAME—*Statement of Material Averments.***—In general, material averments in pleading must be alleged with certainty.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

EDWIN F. ABBOTT, attorney for appellants.

F. M. BURWASH, attorney for appellee; J. W. BYAM, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

It is necessary that material allegations shall be unequivocally made. The declaration in the present case is faulty because it is uncertain.

In one count, the allegation as to negligence and its consequence is as follows :

“The defendants, whilst they were then and there carrying on said work as aforesaid, negligently, wrongfully and improperly left or cut away certain steep banks about said excavation, or threw out and piled up or caused to be thrown out and piled up the earth taken from said excavation into precipitous banks around and about said excavation and allowed the same so to remain, and suffered and permitted divers loose and unsecured materials, to wit, iron pipes, to be and remain thereon or thereabouts, and without erecting or placing any proper safeguards thereabouts or around said excavation, to prevent the same from falling or being propelled into said excavation and upon divers, the persons rightfully therein, and by means of the premises one of the iron pipes as aforesaid, so wrongfully permitted to be and remain on or about said precipitous banks, then and there fell, or was propelled into said excavation, so unprotected and unsecured as aforesaid, upon the body and person of said plaintiff, then and there rightfully being in the said excavation.”

In the second count the allegation as to this is :

“Yet the defendants wholly disregarded their duty in the premises at the time aforesaid, and whilst the plaintiff was then and there rightfully being in said deep excavation, using all due care and diligence in and about his own safety and well being, wrongfully, negligently, carelessly and improperly precipitated or rolled or allowed to be precipitated or rolled or to fall therein, or improperly neglected to interpose proper barriers to prevent from falling or rolling or being precipitated therein, a certain heavy iron pipe then and there, which struck with great force and violence upon the person of the plaintiff then and there rightfully in said deep excavation.”

For anything that appears in the declaration, the iron pipe was maliciously thrown by a stranger into the excavation, and thus, through the malicious act of such stranger, and not through the negligence of defendant, was the plaintiff injured.

"Or propelled into said excavation," "or allowed to be precipitated," or "neglected to interpose proper barriers to prevent being precipitated," are charges each consistent with the act of precipitation being that of a malicious stranger, for which defendants were not responsible.

An allegation that a certain line of conduct was a duty, is superfluous.

If from the facts stated the law implies a duty, that is a sufficient charge. *West Chicago St. Ry. Co v. Coit*, 50 Ill. App. 640; *Cribben v. Callaghan*, 41 N. E. Rep. 178.

In general, material averments in pleading must be alleged with certainty. Rule VII, *Stephens on Pleading*; 1 *Chitty on Pleading*, 233, 9th Am. Ed.

The declaration fails to state with certainty a cause of action.

The judgment of the Circuit Court is therefore reversed and the cause remanded.

Star Brewery v. A. M. Farnsworth.

1. GUARANTY—*Recovery Sustained*.—A recovery for work done and materials furnished, on the following order—

"CHICAGO, July 20, 1894.

A. M. Farnsworth, Esq.:

DEAR SIR—When you get house and barn completed for Mr. Buban send bill for same to us.

STAR BREWERY,

P. H. Rice, Pres't"

— is sustained.

Assumpsit, for labor and materials. Appeal from the Superior Court of Cook County, the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

Star Brewery v. Farnsworth.

E. S. CUMMINGS, attorney for appellant.

W. IRVING OSBORNE, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

It is a fair inference from the evidence that the appellant contemplated some business arrangements with a Mr. Buban, as a dealer in some capacity in its beer, at a place not far from Lemont called Gary, and that as a preparation for that dealing, Buban needed a house and barn to be erected at Gary, in regard to which he had had some talk, but no bargain, with the appellee.

July 20, 1894, Buban went to the brewery and there had a private conversation with the president—none of which is shown in the case—and at the end of the conversation the president gave to Buban a note as follows:

P. H. Rice, Prest. and Treas.

T. J. Rice, Sec.

THE STAR BREWERY,
Office and Brewery, 1131 Fulton St.

CHICAGO, July 20, 1891.

A. M. Farnsworth, Esq.

DEAR SIR: When you get house and barn completed for Mr. Buban send bill for same to us.

STAR BREWERY,
P. H. RICE, Prest."

Buban carried it to the appellee, who, without further negotiations with anybody, built the house and barn. That done, the appellee made out a statement which Buban marked O. K., and the appellee went with it to the brewery, and presented it to the president to get his money.

The statement was as follows, taken from appellant's brief:

"STATEMENT.

LEMONT, ILL., September 19, 1894.

Mr. G. Buban, Store and Barn at Gary.

In account with

A. M. FARNSWORTH,

Dealer in

Lumber, Hardware, Lime and Coal.

Excavating.....	\$ 57 55
Stone.....	72 60
Lime.....	30 25
Cement.....	16 00
Brick and tile.....	10 00
Crushed stone.....	6 50
Mason work.....	68 50
Plastering.....	79 30
Lumber.....	495 57
Sash, doors, glass, etc.....	117 17
Nails and hardware.....	42 16
Carpenter work.....	195 00
Painting.....	51 00
Papering.....	16 95
Hauling.....	54 00
Sand.....	39 00

 \$1,354 55"

The president was surprised—said he did not expect to to pay over \$300—didn't offer to pay, but said, "I will see that you don't lose that money." Payment not being made, the appellee sued and recovered the amount.

The appellant put in no evidence, but has filed a brief of twenty odd pages to show why, upon this direct order in writing, and *prima facie* evidence of an account stated, the appellee should not have recovered.

We do not deem it our duty to review the brief. The right to recover is clear. *Cobb v. James H. Rice Co.*, 60 Ill. App. 523.

The judgment is affirmed.

John M. Ewen v. Albert G. Wilbor, Jr.

1. **GUARANTOR**—*Who is Prima Facie—Nature of Liability May be Shown.*—The name of a party, other than the payee, upon the back of a promissory note is *prima facie* a guaranty of which the void nature may be shown by other evidence, even parol.

2. **GUARANTY**—*Nature of the Undertaking.*—A guaranty is not an undertaking that the guarantor will perform, but that another will, the legal consequence of which is that, if that other does not perform, the guarantor must make good the damage.

3. **SAME**—*When there is No Liability.*—There is no liability on the part of the guarantor until there is a default on the part of the principal.

4. **CONTRACTS**—*Existing in Different Instruments.*—Where an agreement exists by virtue of two or more written instruments all instruments *in pari materia* are to be read together, as constituting the entire contract.

5. **DEMAND**—*Must be by Parties in Interest.*—Where a promissory note is given only as security for the performance of an agreement to return to the payee a deposit upon a contingency at his option, if demanded, but if not demanded, to continue as such deposit until demanded; a demand for payment of the note by a notary public, is not a sufficient demand for the return of the deposit under the agreement.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

HENRY M. BACON and HENRY SCHOFIELD, attorneys for appellant.

CHARLES M. WALKER and CHARLES M. SHERMAN, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant upon a promissory note, which, as introduced in evidence, is described in the abstract thus:

"\$1250. Chicago, 7th June, 1893. On demand, after six months after date, I promise to pay to the order of

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Albert G. Wilbor, Jr., twelve hundred and fifty and 00-100 dollars, at my office, Chicago, Ills. Value received. Warren Ewen, Jr." "On the back of the note are the indorsements in the order named: 'John M. Ewen,' 'A. G. Wilbor, Jr.' the latter being below the former. No other writing appears on back of the note. Across the face of the note the following words, written with a pen, appear: 'Protested for non-payment this 9th day of December, 1893. I. W. Brown, Notary Public.'"

The notary's certificate of the protest showed that the presentment for payment and protest were made at the request of the Merchants Loan and Trust Company.

The note was given in renewal of a like note—except as to date—given in pursuance of the provisions of a contract between the maker and payee as follows:

"THIS AGREEMENT, made this fifteenth day of November, A. D. 1892, by and between Warren Ewen, Jr., party of the first part, and Albert G. Wilbor, Jr., party of the second part, both of the city of Chicago, Illinois,

WITNESSETH: That whereas, the said party of the first part is the owner of the rights in certain territory of the United States for certain patents known as the muti-color dry process and has applied for certain other letters patent for improved process of making 'blue-prints,' and is about to apply for others, and is likely to improve upon the same and to use, invent and to own other patent processes for copying; and whereas said party of the first part believes and represents unto the said party of the second part that by reason of the superiority of said processes over all others he can procure the same, some or all of them, to be adopted by the United States government for general use in the making of plats, prints and drawings used by government architects in and about all United States government architectural work; now, therefore in consideration of the premises and of the further sum of one (\$1.00) dollar in hand paid by the said party of the second part to said party of the first part, and of other good and valuable considerations, the receipt of which is hereby acknowledged, the said parties of the first

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and second parts, respectively, do hereby mutually covenant, promise and agree each with the other as follows:

First: The said party of the first part hereby agrees to use his best endeavors to procure the adoption by the said government of said processes for use in all government architectural work; and, in the event of being successful in procuring the same or any of them to be so adopted, all profits and other benefits arising therefrom are to be shared by the parties hereto in equal proportions. Whatever contract, agreement or arrangement that shall or may be made with said United States government regarding said processes, or any of them, shall be made between said government on the one hand and Warren Ewen, Jr., and Albert G. Wilbor, Jr., on the other hand; the intention being that each of the parties hereto shall take in his own name and own an undivided one-half interest in any and all contracts, agreements or arrangements that may or shall hereafter be made with the United States government respecting the use of said processes or any of them.

Second: The said party of the second part has, upon the *ensealing* and delivery of these presents, deposited with the *said* party of the first part, as a special deposit and earnest *of good faith* herein, the sum of twelve hundred and fifty (\$1,250) dollars, the receipt of which is hereby acknowledged by *said* first party.

Said sum of twelve hundred and fifty (\$1,250) dollars shall *be held* by said party of the first part as a special deposit; *but it* shall immediately, upon the receipt by said second *party* of a duly executed agreement or contract between the *United States* government and the parties hereto, *providing* for the adoption for general use in government work of *any* of said processes, become the property of the said *party* of the first part to compensate him in full for his *services* and the sale to the said party of the second part of *said* one-half interest in said contract or agreement, and in *all such* other contracts, agreements and arrangements as *shall* hereafter be made with the United States government respecting the use of said process or any of them, as above mentioned.

Provided, however, that unless said contract or agreement with the said government is consummated on or before May 15, A. D. 1893, said sum of twelve hundred and fifty (\$1,250) dollars shall, at the option of said party of the second part, be then returned by said first party to said second party, and then and in that case this agreement shall be ended, and from thenceforth absolutely null and void. Should said second party, however, not elect to have said sum of twelve hundred and fifty (\$1,250) dollars returned to him, as aforesaid, it shall continue to be held by said first party as such special deposit aforesaid until said government contract or agreement shall be made or until demanded by said party of the second part, when it shall be at once due and payable to him.

In order to better secure the repayment of said sum of twelve hundred and fifty (\$1,250) dollars in the event that repayment thereof should be demanded, the said party of the first part has made, executed and delivered his note of hand for said sum, of even date herewith, payable on demand after six months after date, to the order of said party of the second part, at the office of said first party, Chicago, Illinois, and has procured said obligation to be guaranteed by John M. Ewen, of Chicago, Illinois.

WARREN EWEN, JR. [SEAL.]

ALBERT G. WILBOR, JR. [SEAL.]”

The appellant's name on the back of the note is *prima facie* a guaranty, of which the real character may be shown by other evidence—even parol. *Kingsland v. Koepp* 35 Ill. App. 81, 137 Ill. 344.

A guaranty is not an undertaking that the guarantor will perform, but that another will, the legal consequence of which is that if that other does not perform, the guarantor must make good the damage. *Gridley v. Capen*, 72 Ill. 11.

If there be no default by the principal, there can be no liability by the guarantor. *Harts v. Fowler*, 51 Ill. App. 612; 53 Ill. App. 245.

Now the note of which the note in suit is a renewal, being given in pursuance of that agreement of November 15, 1892,

was subject to whatever there was in that agreement to limit its effect, as "all papers *in pari materia* are to be read together, as constituting the entire contract." Grand Lodge, etc., v. Jesse, 50 Ill. App. 101; Greenebaum v. Gage, 61 Ill. 46. And the note in suit being only in renewal of the other, would be of the same legal effect as that. Wheelock v. Berkeley, 138 Ill. 153.

The principle is the same as is applied in case a note secured by mortgage is renewed—the security continues. Flower v. Elwood, 66 Ill. 438.

Now turning to that agreement of November 15, 1892, it is seen that the original note was given only as security for the performance by Warren Ewen, Jr., of undertakings as there shown, and that among his undertakings was to return to the appellee a deposit of \$1,250 upon a contingency, and at the option of the appellee, if demanded by the appellee, but if not demanded, to continue as such deposit until demanded.

That, as the certificate of the notary says, he went "to the office of Warren Ewen, Jr., in the city of Chicago, during ordinary business hours, and demanded payment," is no demand under the agreement, for two reasons at least: First, he went at the request of the bank, which is not shown to have had any interest in the note; and second, it is not shown that Warren Ewen, Jr., knew anything about it.

As, therefore, the appellee did not show himself entitled to a return of the deposit by Warren Ewen, Jr., he had no right of action against the appellant, upon the security given for the return of that deposit.

The law as to what is sufficient presentment for payment of commercial paper in order to charge indorsers has no application to this case.

The judgment is reversed, and in order that the case may be reviewed by the Supreme Court, that reversal will be specifically for refusing the third instruction asked by the appellant, which was to find for the defendant, and the cause will not be remanded.

**John Claney and James V. Allen v. Chicago Dredging
and Dock Co.**

1. *CONTRACTS—Substantial Performance.*—An instruction which informs the jury that if the plaintiff has on his part substantially performed the contract sued on he will be entitled to recover, is erroneous in form, as calculated to mislead.

Assumpsit, on a contract for dredging. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 8, 1897.

VERMILYEA, BURRAS & WILCOXON, attorneys for appellants.

SAMSON & WILCOX, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The parties agree that the appellants employed the appellee to dredge the north branch of the Chicago river in front of their dock, to the depth of fourteen feet, is the appellants' version, and "about" that is the appellee's, as they expected a boat in drawing thirteen and one-half feet, which they wanted to get to the dock. The boat came in and grounded ten feet from the dock in thirteen feet three inches of water at her keel, eighteen feet from the dock.

For the appellee the court instructed:

"The court instructs the jury that, if the jury believe from the evidence that the plaintiff dredged the river at the defendants' dock, for the defendants, substantially fourteen feet deep, and took out 901 cubic yards, and the price agreed upon was twenty cents per cubic yard, then the jury should find the issues for the plaintiff and assess the plaintiff's damages at the sum of \$180.20."

And refused to instruct for the appellants:

"The court instructs the jury that if they believe from the evidence that the contract between the plaintiff and the

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defendants was, that the plaintiff should dredge the river at the defendants' dock, making the depth at that place fourteen feet, at a certain sum per cubic yard, and that the doing of this work was a condition precedent to payment, and that the plaintiff did not dredge the river to the depth of fourteen feet at the place contracted, then the jury should find for the defendants."

The real motive for the contract—as well understood by the appellee as by the appellants—was to get depth of water sufficient for the boat; and it may well be presumed that had that depth been reached, the appellants would never have known what it was in feet and inches.

Any instruction which left the jury at liberty to find for the appellee, with the purpose of the contract not accomplished, was error.

Argument to us that after the dredging was done, and before the boat came, the earth may have filled in, or that by change of wind the depth may have been affected, does not touch the question here.

Mathematical exactness, taking the version of either party, was not required; but such depth—near fourteen feet—as would permit a boat drawing thirteen and one-half feet to get to the dock, was.

The river did not belong to the appellants.

There is no presumption that partial performance of a contract to deepen it was any benefit to the appellants.

The case has no resemblance to those in which it has been held that recovery might be had for substantial performance, of which the party sued had the benefit, leaving him to recoup his damages. 2 Chit. Cont. 825 *et seq.* and notes; Keeler v. Herr, 157 Ill. 57.

If after the word "and" following "deep" in the instruction given for the appellee, had been inserted "sufficient to permit a boat drawing thirteen and one-half feet to get to the dock, and in so doing," or other language to that effect, the appellants would have had no ground of complaint as to the law, and the verdict of the jury might have been final.

The judgment is reversed and the cause remanded.

A. Moore v. Simon Cohen.

1. JUDGMENTS—*Relief from, in Equity.*—Equity will grant relief against a judgment which is against conscience, or the justice of which can be impeached by facts, or on grounds of which the party could not avail himself at law, or of which he was prevented from availing himself by fraud, accident, mistake or the act of the opposite party, without any negligence or fraud on his own part, and will also sometimes relieve after verdict, and when the defendant at law might have defended himself.

Bill, to set aside a judgment. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

I. T. GREENACRE, attorney for appellant.

JOHN C. TRAINOR, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was a proceeding in chancery to set aside a judgment. The complainant alleged that he was misled by the defendant, plaintiff, in the judgment, and thereby by mistake he failed to appear upon the trial of the cause, and that judgment was obtained against him by defendant.

Upon the hearing of the bill it appeared that appellant began, against appellee, a suit before a justice of the peace; that upon the return day of the summons complainant appeared and appellant, the plaintiff, not appearing, the suit was dismissed for want of prosecution; that thereafter appellant began another suit before a justice of the peace; that appellee again appeared upon the return day and appellant, the plaintiff, not appearing, the suit was dismissed; that appellee then began suit against appellant, before a justice of the peace; that a trial was had, both appellant and appellee being present; that as the result of such trial the defendant, appellant, recovered a judgment against appellee for \$3.40 and costs; that appellant took an appeal from said judgment to the Circuit Court, which appeal is

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there pending; that thereafter appellant took an appeal in the case first brought by appellant, which was dismissed by the justice of the peace for want of prosecution, appellant not having appeared upon the return day; that appellee had no notice of such appeal, and consequently paid no further attention to such suit, and had no intimation that an appeal had been taken until he was informed that in the Circuit Court, to which such appeal was taken, a judgment for \$130.92, with \$13.55 costs, had been rendered against him. The term at which such judgment was entered had passed and appellee found himself without remedy save in a court of equity.

It is manifest that appellee was, by the conduct of appellant in commencing a second suit after suffering the first to be dismissed, and in permitting the second to be also dismissed, and by the judgment of \$3.40 rendered in the third suit, lulled into the belief that the suit first begun had been abandoned.

Most persons would have thought as did appellee, and would not have suspected or watched for an appeal of either of the suits which were dismissed. Appellee, without fault, as the consequence of a natural mistake, has had a judgment for \$130.92, with \$13.55 costs, rendered against him without his having the opportunity to be heard in the matter, which it is the design of the law all men shall have before judgment is rendered.

Appellee appears to have such meritorious defense as entitles him to a hearing. No injustice is done by the decree of the court below setting aside said judgment against appellee, and it is affirmed.

Joseph P. Davenport v. Plano Implement Co.

1. STOCK—Of Corporations—When it May Be Paid for in Property.
As between the corporation and its stockholders, stock may be paid for in property at money's worth, as well as in money, when all the elements of the transaction are fair, honest and open.

2. **EQUITY PLEADING—Unnecessary Averments.**—When equity is resorted to for the purpose of compelling the performance of an agreement by a corporation for the exchange of stock for property, there need not be an averment that the property which was the subject of the agreement was of the value of the stock for which it was to be exchanged.

3. **SAME—Prima Facie Case—Sufficiency of the Bill and Burden of Proof.**—A bill which makes out a *prima facie* case for equitable relief under a contract of sale and shifts the burden upon the defendant to show an excuse for non-performance, is not subject to demurrer for not alleging facts which are pure matters of defense.

4. **BURDEN OF PROOF—Non-performance of a Contract.**—In a proceeding in equity to enforce the performance of a contract, the burden of making out a case of excuse for the non-performance of such contract is upon the defendant.

Bill, for specific performance. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897.

F. W. BENNETT, attorney for appellant.

SLUSSER & JOHNSON, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree sustaining appellee's demurrer to and dismissing appellant's amended bill for want of equity.

The object of the bill was to compel the appellee corporation to issue and deliver to appellant a certificate for 180 shares of the paid up capital stock of said corporation of the face value of \$9,000.

The bill set up a state of facts under which the appellant and his partner transferred to the appellee, an agricultural implement manufacturer, a certain manufacturing plant consisting of machinery, fixtures, patterns and tools, and a stock of manufactured goods, used and made in an agricultural implement business theretofore carried on by themselves as partners, in full payment for 360 shares of the full paid capital stock of the appellee of the par value of

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\$18,000, of which the appellant was to have 180 shares of the par value of \$9,000, and his partner another like amount.

And such other facts were alleged as to make out a case where, except for such argued reasons as we will later mention, appellant should have had the certificate for his shares of stock issued to him.

It is said that the bill does not allege that appellant paid for his stock in cash, and that the only payment that was alleged being in the form of property, it was necessary to show its value.

Under the averments of the bill particularizing what the property was; that it was inspected by a committee acting in behalf of the appellee, and was accepted and has since been retained and used by the appellee in its business; and that the board of directors of appellee by an express resolution, unanimously adopted, authorized and directed the agreed amount of stock to be delivered to appellant in affirmance of and in accordance with the agreement, no averment of the actual cash value of the property was required.

Stock may be paid for in property at money's worth, as well as in money, when all the elements of the transaction are fair, honest and open.

In this case the allegations of the bill show that the transaction was made upon a full investigation by a committee, and with deliberation and fairness.

Nor was it necessary to show, as argued, that each stockholder assented to the arrangement. The allegation concerning assent and ratification by the shareholders was that the "stockholders or a majority of them ratified" the act of the board of directors.

Whether such an allegation would be sufficiently definite if the assent of the stockholders were an essential prerequisite, need not be considered.

This is not the case of a shareholder who is objecting to the carrying out of a contract *ultra vires* the corporation, to which he did not assent; nor is it one in which a creditor is claiming, in order to make his debt from the corpo-

ration, to inquire into the methods resorted to by stockholders, good, as between themselves and the corporation, to pay for the stock subscribed by themselves. *Thayer v. El Plomo Mining Co.*, 40 Ill. App. 344.

But the case is that of a refusal by a corporation to carry out one of the essential parts of a lawful agreement made by its board of directors to purchase and pay in stock for property which it has received and retains and uses in the conduct of its business, and, where equity is resorted to for the purpose of compelling a full performance of such an agreement, there need not be an averment that the property, which was the subject of the agreement, was of the value of the stock for which it was to be exchanged.

The burden of making out a case of excuse, if there be any in such respect for non-performance, is cast upon the appellee.

A bill that makes out a *prima facie* case for equitable relief under such a contract and shifts the burden upon the defendant to show excuse for non-performance, is not subject to demurrer for not alleging facts which are pure matters of defense.

Again, it is said that the bill is fatally defective in that it does not show that appellant has not a full and adequate remedy at law, and *Barton v. DeWolf*, 108 Ill. 195, and *Pierce v. Plumb*, 74 Ill. 327, are relied upon.

But those cases are, in our opinion, far one side of the mark in this case.

Although the bill is loosely and inartificially drawn, its object is plain, and it should be treated, as against a general demurrer, as making a case of conceded ownership by the appellant of the shares in question, and of a denial to him by appellee of his right to have issued to him a certificate of such ownership, as an evidence of his title to what he owns.

According to the averments of the bill, appellant is the equitable, if not the legal, owner of the 180 shares of stock. He has paid for such shares in full, and appellee retains and uses what he paid for them. The agreement between the parties has been fully performed on both sides, except in so

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far as the delivery of the certificates of shares is concerned, and such a delivery is a mere incident to the ownership of the shares. The stock in which the ownership exists is the substance of that which the certificate is but the shadow or evidence of.

While the possession of a certificate by the share owner is not essential to his ownership, it is evidence of ownership, and is such an evidence as every share owner is ordinarily entitled to be furnished with by the corporation, under reasonable regulations.

The object of the bill is not to compel, by specific performance, the corporation to pay for the property purchased and received and held by it—for taken all together the averments of the bill amount to showing that to have been done—but is, as already said, to enforce a delivery to appellant of the usual certificate which shareholders are under the law entitled to receive as evidence of their ownership in the corporation.

Under such circumstances there can be no adequate remedy at law. Appellant could not be entitled to recover the value of the stock which he is already the full owner of for a mere failure to deliver to him a certificate of such ownership.

Damages at law for such a failure would, under the circumstances stated in the bill, be no more than nominal, and would be wholly inadequate to compensate him for the inconvenience and possible loss and deprivation incident to a withholding from him of the certificate that the law regards a share owner to be ordinarily entitled to the possession of.

We regard the bill as presenting a proper case for equitable relief. 3 Pom. Eq. Juris., Sec. 1402.

For convenience of reference, and in support of what we have said about the offices of and right to a certificate of stock, we cite Secs. 14 and 192 of Cook on Stock and Stockholders; Elliott on Priv. Corp. 61 and 78; Morawetz on Priv. Corp., Secs. 56 and 472, and cases there cited.

The decree dismissing appellant's bill is reversed and the cause remanded, with directions to allow appellant to amend his bill if he so desires.

70	166
172s	222s
70	166
100	1268

Hartford Deposit Co. v. Oliver Sollitt.

1. INSTRUCTIONS—*To be Considered as a Series.*—All the instructions given in a case, on both sides are to be considered as a single series.

2. SAME—*When a Party Can Not Complain.*—A defendant can not complain of an instruction given for the plaintiff when he asks and procures to be given one of the same kind himself.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

BURNHAM & BALDWIN, attorneys for appellant.

THOMAS BATES and SEYMOUR EDGEMTON, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is in the class of cases in which, if the plaintiff can get by the court to the jury, he is sure of success, and in which a reviewing court feels that the consideration of any questions presented by the record—not going to the ultimate right of the plaintiff to recover, nor to the extent of the damages—“is vanity and vexation of spirit.”

The appellee was a passenger in an elevator in an office building of the appellant, and in which building appellee was tenant. The elevator fell and he sustained injury, for which he sued the appellant and recovered \$4,000. On this record we may not say that the amount is more than adequate compensation for the severe and permanent injury.

The declaration contained two counts. By the first it charged that through the carelessness, negligence and unskillfulness of the defendant and its servant, the elevator slipped in the shaft in which it ran and fell from the eighth floor to the ground floor. The second count charged that the defendant did not use due and proper care that the plaintiff should be safely carried, and did not have all the

most improved and proper appliances attached to prevent the too rapid fall of the elevator, and did not have said appliances in good and proper order and condition for performing their work.

The first complaint of the appellant is shown by the brief as follows:

"In submitting the case to the jury, plaintiff's counsel asked, and the court gave to the jury, the following instruction:

'The court instructs the jury that if they believe from all the evidence in this case that the plaintiff, on or about the 19th day of May, 1893, was rightfully in an elevator in the possession of and operated by the defendant, and situated in the defendant's building, for the purpose of being carried thereby from one of the upper floors of the defendant's said building to the ground floor thereof; and if you further believe from the evidence that while the plaintiff was so in said elevator and in the exercise of reasonable and ordinary care on his part, said elevator, owing to the negligent and faulty construction thereof, or owing to the negligence and carelessness on the part of the servant of the defendant in operating the same, fell; and if you further believe from the evidence that the injury to the plaintiff complained of was caused by such fall of said elevator, then your verdict should be for the plaintiff.'

This instruction was not justified or proper under the pleadings. It was too broad, and it directed the attention of the jury to an issue not involved in the case. The declaration does not allege negligent and faulty construction; it is confined to charges of negligent operation and failure to have the most approved safety appliances, or to keep them in good order. Neither of these grounds can warrant a general charge of negligent construction."

When the appellee put in his case, he confined himself wholly to what occurred at the time of the fall, with nothing relating to the construction of the elevator or any of its appurtenances. His evidence was only such as was intended to prove the first count.

Then the appellant went into evidence showing the construction, in part, of the elevator; why it fell, and the means provided for arresting its fall in case of accident.

The elevator was operated by water pressure—maximum 750 pounds to the square inch when the elevator goes up, forty per cent less going down, as it was at the time of the accident.

To the cylinder the water was admitted through an one and one-half inch pipe which burst, letting the water run out, without control, as fast as it could under the pressure, through a five-eighth inch hole in a washer where the pipe was attached to the cylinder.

There were dogs intended to catch hold of guide posts in case the elevator was descending too fast, and stop it, not suddenly, but sliding “along a little distance and bring the car to rest.”

The elevator started to descend very rapidly from the eighth floor, and to fall at the fourth, and was stopped only about four feet from the bottom.

The evidence thereafter put in by the appellee with reference to the elevator was substantially, if not literally, in reply, and at the instance of the appellant the jury was instructed—

“The jury are instructed that before the plaintiff can recover any damages in this case against the defendant, he must show by a preponderance of the evidence that the said defendant was guilty of negligence as charged in the declaration, and that the plaintiff was injured in consequence of such negligence on the part of said defendant, and not by reason of any latent defect in any part of the said elevator or appurtenances, which latent defect was unknown to the said defendant, and could not have been discovered by it upon careful examination or by the application by competent persons of the proper and usual tests for that purpose.”

It is hardly necessary to apply the doctrine that all of the instructions, on both sides are to be considered as a series. *Wenona Coal Co. v. Holmquist*, 152 Ill. 581; *City of Roodhouse v. Christian*, 158 Ill. 137.

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The defect in the pipe was latent—admit that, and there remains the fact that devices contrived and intended to prevent the disastrous consequences of defects were not in condition to do the work assigned to them; and there is no ground to claim that in them defects were latent—not discoverable by inspection. So the instruction could have done no harm. If the accident did, or did not, have its origin in the cause charged in the first count, its result was the consequence of what is charged in the second.

The residue of the appellant's brief presents matters less serious, as to which its counsel will doubtless agree, that if we are right in what we have said, we are not wrong in saying there is no error in them.

The judgment is affirmed.

B. A. L. Thomson v. F. A. Rehkopf.

1. *EVIDENCE—Existence of, and Proceedings Under Mortgages.*—The existence of a new mortgage, given to satisfy a prior mortgage, can not be shown by parol, and until the existence of such new mortgage is proved, evidence of what has been done under it, or of any supposed effect of it in satisfying the prior mortgage, is inadmissible.

2. *SAME—Records of Mortgages—When Competent.*—To render the record of a mortgage competent evidence a compliance with the statute (Section 5, Chapter 95, R. S., and section 36, chapter 30, R. S.) is necessary.

Trover.—Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 6, 1897.

THOMSON & DENMARK, attorneys for appellant.

A chattel mortgage given in satisfaction of a prior mortgage is a payment of the prior mortgage, so as to permit intervening mortgages to take precedence over the last mortgage given. Jones on Chattel Mortgages, p. 645; Tracy v. Lincoln, 145 Mass. 357; Brown v. Dunkel, 46 Mich. 29.

S. G. ABBOTT, attorney for appellee.

The *record*, or a *transcript* of the record, of instruments relating to the conveyance of lands may be read in evidence, on proper foundation being laid, but only copies of chattel mortgages certified to by the recorder are admissible in evidence, and then only on the same condition as instruments relating to the conveyance of lands.

Appellant offered the record of a chattel mortgage in evidence, not a certified copy thereof, and never laid any foundation therefor, without which it was not proper evidence. *Pardee v. Lindley*, 31 Ill. 174; *Stow v. The People*, 25 Ill. 81; *Rankin v. Crowe*, 19 Ill. 626.

Where the statute authorized a certified copy of the record only, on proper foundation being laid, yet it is error to introduce the record itself, although a proper foundation was laid to introduce the copy. *Hanson et al. v. Armstrong*, 22 Ill. 442.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of trover by the appellant against the appellee; the appellant claiming under chattel mortgages made by one Reitz, and the appellee defending under a prior mortgage made also by Reitz.

The appellant tried to show that the latter mortgage was not in force, having been satisfied by the taking of a new mortgage from Reitz to the appellee of later date than those under which appellant claimed.

The court rightly ruled that the existence of such new mortgage could not be proved by parol, and that until such existence was proved, evidence of what was done under it, or of any supposed effect of it in satisfying the prior mortgage, was inadmissible.

The appellant offered, as evidence of a new mortgage, the record of such a mortgage in the recorder's office, but attempted no compliance with the conditions prescribed by statute to make such record evidence. Sec. 5, Ch. 95, Mortgages; Sec. 36, Ch. 30, Conveyances.

Appellant offered to prove that he had "made a demand" upon the appellee—of or for what was not stated—and he

excepted to the refusal of the court to permit the questions to the appellee, whether he had handed to his counsel, or his counsel had in his possession, any paper executed by Reitz to the appellee subsequent to the mortgage under which the appellee claimed. We need not consider those questions further than to say that vague and general as they were, accompanied by no offer to prove any specific thing, but being merely fishing, no error was committed by the court in the rulings. *Gaffield v. Scott*, 33 Ill. App. 317.

The appellant had an easy method open to him to prove that later mortgage—if one there was—by complying with the statutes hereinbefore referred to; not adopting it, there is no question of such mortgage in the case, and the judgment is affirmed.

MR. JUSTICE WATEMAN.

I am of the opinion that the court should not have sustained the objection made to certain questions asked by appellant; but had the witness been permitted to answer, and if by competent evidence it had appeared that a subsequent mortgage was in existence, such proof only would not have invalidated the first mortgage or raised a presumption that it had been satisfied.

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West Chicago Street Railroad Co. v. Nils Nilson.

1. *NEGLIGENCE—Of Street Railway Operating Double Track.*—A plaintiff bringing suit for personal injuries against a street railway company operating a double track railroad showed that he came near the track as a car was approaching; that he waited for it to go by and then undertook to go on his way, passing behind it, and was knocked down and hurt by a car on the other track going the other way, of which car he had no warning. *Held*, that a verdict finding the defendant guilty of negligence and the plaintiff in the exercise of ordinary care must stand.

2. *ORDINARY CARE—All That Is Required.*—An instruction telling a jury that on a certain hypothesis a plaintiff suing for personal injuries

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West Chicago St. R. R. Co. v. Nilson.

should have exercised "the highest degree of vigilance and care for his own safety" is bad. The duty of the plaintiff was only to exercise such vigilance and care as reasonably prudent and cautious persons exercise under like circumstances.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

ALEXANDER SULLIVAN, attorney for appellants; EDWARD J. McARDLE, of counsel.

The operation of street cars by either cable or electricity in the street is attended with hazard and danger, and appellee is presumed to know that, and act with care accordingly. *Carson v. Fed. St. Ry. Co. (Pa.)*, 35 Cent. L. J., 145; *Ehrisman v. E. H. C. P. Ry.*, 24 Atl. R. 596.

While the law does not pronounce the failure to look and listen on approaching a railroad crossing negligence *per se*, the courts, when vested with power to pass on questions of fact, regard the absence of these precautions—without explanation—negligence. *Partlow v. Illinois C. R. R. Co.*, 150 Ill. 321.

Taking place of danger is an assumption of all attending risks. *Illinois C. R. R. Co. v. Beard*, 49 Ill. App. 232; *Illinois C. R. R. Co. v. Hall*, 72 Ill. 222; *Simmons v. C. & T. R. R. Co.* 110 Ill. 340; *Peoria v. Walker*, 47 Ill. App. 182; *Beach, Contrib. Neg.*, Sec. 12; *Halpin v. Third Ave. R. R. Co.*, 40 N. Y. Super. 175; *Johnson v. Canal & C. Ry. Co.*, 27 La. Ann. 53; *Mercier v. New Orleans & C. R. R. Co.*, 23 La. Ann. 264, *Miller v. St. P. Ry. Co.*, 42 Minn. 454; *Morris v. L. S. & M. S. Ry. Co.*, 42 N. E. Rep. 579; *Rose v. Phila. R. R. Co.*, 12 Atl. Rep. 78; *Smith v. Marine C. R. R. Co.*, 87 Me. 339, *Trouscclair v. Pac. C. S. Co.*, 80 Cal. 521.

Persons assuming or going into places which ordinarily prudent men regard as extra hazardous are required to exercise care in proportion to the danger. *Chicago, B. & Q. R. R. Co. v. Olson*, 12 Ill. App. 245; *Chicago & N. W. Ry. Co. v. Reilly*, 40 Ill. App. 416; *Beach, Contrib. Neg. Sec. 9*, p. 22; *Barker v. Savage*, 45 N. Y. 191; *B. & O. R. R. Co. v. Whitacre*, 35 Ohio St. 627; *Chicago, R. I. & P. R. R. Co.*

v. Houston, 95 U. S. 697; Childs v. N. O. City R. R. Co., 33 La. Ann. 154; Gumb v. 23d St. Ry. Co., 53 N. Y. Super. 466; Miller v. St. P. Ry. Co., 42 Minn. 454.

The cars of appellant have a preference on their tracks and the traveler should give way and inform himself whether a necessity therefore exists. Booth St. Ry. Law, Sec. 303; Chicago, B. & Q. R. R. Co. v. Lee, Admr., 87 Ill. 454; Baker v. Eighth Ave. R. R. Co. 69 N. Y. Sup. Ct. 39; Carson v. Fed. St. Ry. Co., 35 Cent. L. J. 145; Child v. N. O. & C. R. R. Co., 33 La. Ann. 154; Donnelly v. B. City R. R. Co., 109 N. Y. 16; Ehrisman v. E. H. C. P. Ry. Co., 24 Atl. R. 596; Fleckenstein v. D. D. E. B. & B. R. Co., 105 N. Y. 655; Smith v. M. C. R. R. Co., 87 Me. 339; Thomas v. Citizens P. R. R. Co., 132 Pa. St. 504; Warner v. People's St. Ry. Co., 141 Pa. St. 615; Wilbrand v. Eighth Ave. R. R. Co., 3 Bosw. 5 N. Y. Sup. 314.

JOHN F. WATERS, attorney for appellee.

A cable railway company operating dangerous machinery at a rapid speed on and along a public street of a city must know, and in law is bound to know, that men, women and children have an equal right to the use of the highway and will be upon it. Winters v. Kansas City R. R. Co., 40 Am. and Eng. R. R. Cases, 261; 12 S. W. Rep. 652.

It is the duty of the company's servants to be on the lookout and to take all reasonable measures to avoid injuries to persons on the streets.

The gripman of a cable train should always be on the alert to avoid dangers and his attention should never be diverted from his duties. Shnur v. Citizens Traction Co., 153 Pa. St. 29.

Failure of a person to look and listen before crossing the tracks of an electric railway in a public street where cars have not the exclusive right of way is not negligence as a matter of law, like it might be if it were a steam railroad. Robbins v. Springfield St. R. R. Co., 165 Mass. 30; 42 N. E. Rep. 334.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
The evidence for the appellee warranted the conclusion

by the jury that on a very dark night, November 30, 1894, at nearly seven p. m., the appellee attempted to cross Milwaukee avenue from the north to the south on the east crosswalk on Western avenue. Milwaukee avenue is a northwest and southeast street, and occupied by a double track cable line. A car was crossing that crosswalk, going northwest on the right hand track as the car was going. The appellee came near to it, waited for it to go by, undertook then to go on his way, passing behind it, and was knocked down and hurt by a car on the other track going the other way, of which car he had no warning. He sued and recovered, as, under such circumstances, was inevitable. Cars on a double track, passing each other at street intersections, where the one going hides from the pedestrian the one coming, make a case for a jury to treat as negligence. *Chicago City Ry. v. Wilcox*, 33 Ill. App. 450.

And whether the failure by the pedestrian to anticipate such a method of operating the cars, and guard against it, is a want of ordinary care, is a question to which the answer of a jury is never in doubt.

The argument here by the appellant is all upon the evidence, except complaint is made of the refusal of one instruction which was given in another, and the refusal of one that upon a certain hypothesis the appellee should have exercised "the highest degree of vigilance and care for his own safety." That is a degree of vigilance and care required only where one party owes a duty to the other, as a passenger carrier to his passengers. An instruction should not deal in superlatives.

The duty of the appellee was to exercise such vigilance and care as reasonably prudent and cautious persons exercise under like circumstances. *Chicago, St. P. & K. C. R. R. v. Ryan*, 62 Ill. App. 264.

That is short of the highest reach of human endeavor. The judgment is affirmed.

Joseph Bernstein v. The People of the State of Illinois.

1. **STATUTES**—*Jurisdiction of the Appellate Court in Cases Involving the Validity of.*—The Appellate Court has no jurisdiction of cases involving the validity of a statute.

Prosecution, for selling goods with false label. Error to the Criminal Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Writ dismissed. Opinion filed May 24, 1897.

ELIJAH N. ZOLINE, attorney for plaintiff in error; LEON ZOLOTKOFF and HUGO PAM, of counsel.

W. F. STRUCKMAN, attorney for defendant in error; CLIFFORD & MORE, of counsel.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error was prosecuted under section 2 of the act of 1891, amended in 1895 (Hurd's Statutes of 1895, page 1555), for selling "goods contained in a box, to which said box was attached an imitation of the label of the Cigar Makers' International Union of America, an Association of Workingmen."

He was convicted and fined one hundred dollars.

In the Criminal Court, by motion to dismiss, to the denial of which the plaintiff in error excepted, he challenged the validity—constitutionality—of section 12 of the act under which the prosecution was commenced before a justice of the peace.

By motions of a new trial and in arrest of judgment, not specifying the grounds, the same question was raised. O. O. & F. R. V. R. R. v. McMath, 91 Ill. 104.

Overruling those motions is assigned as error.

Now his brief argues the question for our consideration. He has thereby ousted this court of jurisdiction of this writ of error, as cases involving the validity of a statute are excepted from the jurisdiction of the Appellate Courts. Sec.

8 of Act of 1877, creating Appellate Courts. Ames v. Ames, 44 Ill. App. 576; 148 Ill. 321.

A freehold and the validity of a statute are on the same plane as to jurisdiction.

The writ of error is dismissed.

Atlas Sewer Pipe Co. v. Joseph Stickney and D. S. Bolkeom.

1. VERDICTS.—*Sufficiency of—In Replevin.*—Upon issues in replevin, formed by the pleas of *non cepit*, *non detinet*, and property in a third person, a verdict finding the issues for the defendant is sufficient.

Replevin.—Appeal from the Circuit Court of Cook County; the Hon. CHARLES F. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

EDWIN C. CRAWFORD, attorney for appellant.

CHARLES M. WALKER, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of replevin, resulting from the levy of a distress warrant upon the property afterward replevied.

The issues were formed upon five pleas filed by appellee, viz: *Non cepit*, *non detinet*, not guilty, property in one Stickney, and property in Chicago Sewer Pipe & Coal Co.

The verdict of the jury was: "We, the jury find the issues for the defendants."

This, appellant urges, was not responsive to the issues.

The verdict was sufficient.

As to the questions of fact, we find no sufficient reason for interfering with the conclusions of the jury or the judgment of the court.

The judgment of the Circuit Court is affirmed.

American Trust and Savings Bank v. Pack, Woods & Co., for Use, etc.

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70	177
190	381

1. **ATTACHMENTS—Are Purely Statutory Proceedings.**—Proceedings by attachment are in derogation of common law and can only exist by virtue of some statutory provisions.

2. **SAME—Alias Writs Not Provided For.**—The statute of this State makes no provision for an *alias* writ in case of an original attachment, and the same is true of an attachment in aid.

3. **SAME—Alias Writs of Attachment Void.**—Where an attachment in aid of a suit at law was returned unexecuted by order of the plaintiff's attorney, who afterward filed another bond and affidavit substantially the same as the first, and upon which another attachment in aid was issued, *it was held*, that the second writ, although not containing the words "as we have before commanded you," was an *alias* writ and void as not being authorized by the statutes of this State.

4. **ALIAS WRITS—Defined.**—An *alias* writ is one which is issued when a former writ has not produced its effect, and is so called from the words "as we have formerly commanded," being inserted after the usual commencement, "We command you," although such words are not necessary and their omission does not change the character of the writ.

Attachment Proceedings.—Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1897. Reversed without remanding. Opinion filed May 24, 1897.

HAWLEY & PROUTY, attorneys for appellant.

FARSON & GREENFIELD, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment by default for \$277, rendered November 5, 1896, against the appellant, as garnishee, in a suit begun July 23, 1895, by one Parker, as receiver, etc., against the appellee, Pack, Woods & Company, a corporation, and summons was issued therein, returnable to the August term, 1895, of said court.

On the same day the suit was begun, the plaintiff filed

an affidavit and bond for an attachment in aid, and the writ was issued returnable to the same term of court, but was returned August 5, 1895, unexecuted, by order of plaintiff's attorney. In that writ certain persons, not including the appellant, were summoned as garnishees.

Afterward, on October 1, 1895, the plaintiff filed another affidavit and bond for attachment in aid of the same suit, and another writ of attachment in aid was issued. Such affidavit, bond and writ, were in substance the same as the former, except that the garnishees named in the first writ were omitted, and the name of appellant as garnishee was inserted in the second writ.

The second writ was returned served upon appellant on the day it issued. Subsequent proceedings in the suit were had, including publication of notice, etc., to the defendant, resulting in a conditional judgment against appellant as garnishee on October 5, 1896, and the issuance of a writ of *scire facias* to the appellant and service thereof, and final judgment against appellant by default, on November 5, 1896, which is the judgment appealed from.

On November 6, 1895, appellant filed its special appearance and motion (specifically limiting such appearance to the purpose of the motion) to quash the said second writ, upon the ground specified in the motion that said second writ was an *alias* writ of attachment, and as such was unknown to and unauthorized by the laws of this State, and void; and that said second writ had not conferred upon the court jurisdiction of the person of appellant.

Subsequently, the defendant filed its like special appearance and motion, but both motions were overruled.

This court has held in *Dennison v. Blumenthal*, 37 Ill. App. 385 (affirmed by the Supreme Court under the title of *Dennison v. Taylor*, 142 Ill. 45, upon another point, and without alluding to the point in question), that proceedings by attachment are in derogation of the common law, and can only exist and be carried on by virtue of some statutory provision, and that the statutes of this State make no provision for an *alias* writ in case of an original attachment;

and such decision applies as well in the case of an attachment in aid, as in the case of an original attachment.

Secs. 31 and 33 of the attachment act require that proceedings in the cases of attachments in aid shall, as near as may be, conform to proceedings in cases of original attachments, and it follows that if no *alias* writ may issue in cases of original attachments, none may in cases of attachments in aid. *Crandall v. Birge*, 61 Ill. App. 234.

But appellee contends that because nothing was done under the first writ except to return it unexecuted by order of plaintiff's attorney, it was a nullity, the same as if no writ had ever issued, and therefore the plaintiff had in reality but one writ of attachment in aid of his suit, viz.: the second writ, which therefore was not in any proper sense an *alias* writ. We can not assent to the correctness of such contention.

An "*alias*" writ is one which is issued when a former writ has not produced its effect, and is so called from the words "as we have formerly commanded you" (*sicut alias præcipimus*,) being inserted after the usual commencement, "We command you." Blackstone, Chap. 19, Book 3. But whether such words, *sicut alias*, be used or not, can not, as we conceive, make a second writ an original one. The omission by the clerk of such words can not change the fact.

"An *alias* writ is a writ issued where one of the same kind has been issued before in the same cause.

The second writ runs, in such case, 'we command you as we have *before* commanded you' (*sicut alias*), and the Latin word *alias* is used to denote both the writ and the clause in which it or its corresponding English word is found. It is used of all species of writs." Bouvier's Law Dictionary, "Alias;" Black's Law Dictionary; Rapalje and Lawrence's Law Dictionary; The Century Dictionary.

Nor could the fact that in the second writ there was named a different garnishee from that named in the first writ, make the second writ an original writ.

The naming of garnishees in either writ was not necessary to the full operation of the writ against the property

of the defendant. The right to have garnishees summoned is only an additional right given by the statute to the plaintiff in the attachment writ, as a method of reaching debts due to the defendant in addition to property of the defendant that is subject to levy, but such a summoning is not at all essential to the validity or regularity of the writ. In such regard it neither adds to nor takes from the writ.

All other questions that are argued, hang upon the question of jurisdiction, and no jurisdiction having been obtained over the person of the appellant through the *alias* writ, the judgment of the Superior Court will be reversed, but without remanding the cause.

Margaretha Dovenmuehle, Executrix, etc., v. Herman Eilenberger.

1. **STATUTE OF FRAUDS—*Applied.***—The court discusses the evidence and holds that the agreement sued on is a promise to answer for the debt of another and that not being in writing an action upon it is barred by the statute of frauds.

Assumpsit, on a guaranty. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

ALBERT N. EASTMAN, attorney for appellant.

SIGMUND ZEISLER, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant argues that the peremptory instruction of the court to find for the defendant—the appellee—was contrary to the opinion of this court in *Berkowsky v. Viall*, 66 Ill. App. 349. There is no resemblance between the cases. The recovery there was upon the express promise (as the jury found in effect) to pay for goods which the appellee declined to furnish except upon that promise; and no men-

tion was made in the court below of a defense under the statute of frauds. Whether the contractors were by the parties regarded as also liable or not does not appear in the report. The case is much like *Clifford v. Luhring*, 69 Ill. 401, and *Schoenfield v. Brown*, 78 Ill. 487.

Here the whole conversation upon which the appellant relies was on the subject of a guaranty, and the attorney of the appellant, on the trial called his action one for "five hundred dollars, which we claim was guaranteed here."

The case as presented by the appellant is that the brother of the appellee wanted to buy goods from the appellant—that the appellant wanted security, and that the result of a conversation between the parties was—as the appellant described it in his testimony, "an understanding I would submit a writing, and that the writing was to be the evidence of the security or guaranty that would give his brother credit."

Incautiously the appellant sold and delivered the goods without getting the writing, and then the appellee refused to sign it.

The case is governed by the rule followed in *Geary v. O'Neil*, 73 Ill. 593.

The statute of frauds is a complete defense, and the judgment is affirmed.

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John I. Warman and Charles H. Schub v. The First National Bank of Akron.

1. **PLEAS**—*Verification of, on Information and Belief*.—An affidavit by an agent of a defendant that he has read a plea and "verily believes the same to be true," is not a sufficient verification of such plea under Sec. 84, Chap. 110, R. S.

2. **PLEADING**—*Failure of Consideration of a Note Held by an Assignee*.—The defense of a want or failure of consideration for a note, can be made against an assignee only by pleading specially and showing why it is subject in the hands of an assignee to the defense.

3. **SAME**—*Material Facts Not Denied—Proof Unnecessary*.—In a suit

on promissory notes the pleas set up a failure of consideration and that the plaintiff, an assignee, took the notes, either with notice thereof, or after maturity. *Held*, that the pleas did not deny that the assignment was for value, and that it was not necessary to prove that fact.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

BEACH & BEACH, attorneys for appellants.

PADEN & GRIDLEY, attorneys for appellee.

MR JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The first point made by the appellants is that the general issue in assumpsit, to which an agent of the defendants appended an affidavit that he had read it and "verily believes the same to be true," was sufficient to put the plaintiff on proof of the execution of the notes sued upon.

We waive the inquiry whether to have that effect the affidavit must be by the party himself, though it is not easy to see who else could know that he did not sign, or direct the signing of the paper.

When a plaintiff denies an instrument set up in defense, it is his affidavit that is required, and there is no reason for a difference between the parties.

But such an affidavit as was here appended does not verify the plea.

What that agent believed upon any subject was of no consequence in this suit. The denial of the execution is by the plea; the affidavit is to verify the plea; and the proviso of Sec. 34, Ch. 110, R. S., Practice relates (so far as concerns pleas) to cases in which the party whose plea denies is not the party alleged to have executed the instrument. He can not save his conscience, nor screen his person from the consequences of perjury by procuring some convenient friend to believe his statement that he did not execute, preparatory to an affidavit by that friend that he so verily believes.

By various pleas the appellants set up a failure of consideration of the notes, and that the appellee took the notes, either with notice thereof or after maturity.

Congress Construction Co. v. Gutrich.

The evidence by the appellants showed that the bank discounted the notes, and put the proceeds to the credit of the payees, before the maturity of the notes, and was silent as to notice.

A point—which does not appear to have been thought of below—is now made that such discount and crediting of the proceeds does not show that the appellee is a holder for value.

The pleas presented no issue of that kind.

The defense—if one there was in fact—of a want of consideration for the notes, could be made against an assignee only by pleading specially: showing why it was subject, in the hands of an assignee, to the defense.

That showing might be that the assignee took with notice, or after maturity, or without paying value; but under pleas of one reason, proof of another would not be admissible. Had such an issue been made, it is not an improbable conjecture that the bank would have shown that the payee checked out the proceeds, that being the usual purpose for which a holder of commercial paper submits to a discount from the face of it.

The judgment is affirmed.

Congress Construction Co. v. Michael Gutrich.

1. VERDICTS—*On Conflicting Evidence Final.*—Only a question of fact, depending upon conflicting evidence, is involved in this case and under the rule that the verdict of a jury on conflicting evidence is final the judgment must be affirmed.

Assumpsit, on a building contract. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

EDWIN F. ABBOTT, attorney for appellant.

WALKER & DAVIS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

From the record we dig out that, probably, Messrs. Whistler and Fountain had a ground lease, and undertook to erect a building so large that the labor and material for the excavation and masonry would be worth \$4,550. The appellant, by contract with Whistler and Fountain, undertook to erect the building, and was to be paid \$5,000 when the first story joists were on. The appellant and appellee made a contract by which the appellee undertook to do the excavation and masonry. When the walls were ready for them the joists were laid, presumably by the appellant, and the appellee presented a bill for a payment on account under the contract, for \$1,933, less fifteen per cent, to be reserved until after the work was all done.

Then there was trouble.

Whistler and Fountain didn't pay and couldn't.

The appellant took the joists away, and naturally is quite dissatisfied with the quality of the materials, and with the manner the appellee put them into the walls. The counsel of the appellant has presented a good brief, demonstrating, from his point of view, that the complaints of the appellant are well grounded. But the facts from which he draws his conclusions are, with possibly one exception, the subject of conflicting evidence, upon which the verdict of a jury is final.

That exception is that some piers were to be built of sewer brick, and they were in fact built of hard-burned brick, selected from common brick.

There is no evidence that sewer brick make a class by themselves; but several witnesses describe sewer brick as hard-burned, selected from common brick.

The appellee did his work under the supervision of an architect named in the contract, and to his satisfaction; and the preponderance of the evidence is that the secretary of the appellant, himself a practical builder, was also satisfied.

As on the whole case only a question of fact, depending upon conflicting evidence, is involved, we must affirm the judgment.

Samuel Hazle and Peter Schnur v. Theresa A. Bondy and Frederick Bondy.

1. **DEEDS**—*Effect of Return of, to Grantor's Custody Without Recording.*—The return after its delivery of an unrecorded deed does not divest the grantee of the title to the land described therein so as to prevent him from making a conveyance thereof and the title to such land is effectually passed by deeds from him.

2. **PROMISSORY NOTES**—*Adjustment of Amount Due on, in Equity.*—If, by the conduct of the holders of notes secured by trust deed, matters have become complicated, so that the amount due upon the notes is uncertain, they have the right to call upon a court of equity to adjust the equities.

3. **NOTICE**—*Taking Security for Release is Notice of the Effect of.*—Faking a deposit as security against loss by a release is notice of the effect the release may have upon parties affected by it.

4. **DECREES**—*In Accordance With the Facts Approved.*—The court reviews the evidence and finds that the decree follows the proofs and is right in all its parts.

Bill for Relief, from an incumbrance. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Mr. Justice WATERMAN dissenting. Opinion filed May 24, 1897.

DANIEL J. McMAHON and JAMES R. WARD, attorneys for appellant Samuel Hazle.

WM. S. YOUNG and JOHN REID McFEE, attorneys for appellant Peter Schnur.

HENRY D. BEAM and EDWARD D. COOKE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. The appellants are here upon separate appeals, but on one record, and with no community of interest. The appellees are husband and wife, identified in interest.

It will not be necessary to state the voluminous pleadings or evidence, but only the material facts, as we hold them to be. In doing this, we are greatly embarrassed by the fact

that the abstract—nearly one hundred pages—is unindexed, and that the briefs of the respective appellants are very little help in finding where in the abstract or record the proof of any fact stated can be found.

In preparing such documents attorneys should “put yourself in his place” and consider how best they can help a stranger to the case to a knowledge of it.

April 10, 1893, Mrs. Bondy was seized of two lots, numbers 20 and 21, each with a north front of fifty feet on Roscoe street; twenty adjoined twenty-one on the west. The appellees then executed two trust deeds, one conveying one, and the other the other of the lots to Adolph Loeb, each to secure the payment of a promissory note made by them to their own order, and by them indorsed, each for the sum of \$2,000, payable three years thereafter with six per cent interest.

April 6, 1894, they conveyed the whole 100 feet, subject to these incumbrances of \$4,000, to William J. Haerther.

The deed was delivered to him, but never recorded. In a short time he brought it back, and it was destroyed by mutual consent of Haerther and Frederick Bondy, and the appellees made new deeds—dated back, one to April 5, 1894, purporting to convey the east seventeen feet of lot 20, and the west sixteen feet of lot 21 to Bertha Harder; two dated back to March 17, 1894, one purporting to convey the east thirty-four feet of lot 20, and the other purporting to convey the west thirty-three feet of lot 21 to Haerther.

It will be readily seen that by these three deeds the west sixteen feet of lot 20 and the east seventeen feet of lot 21 were not mentioned at all, while the east seventeen feet of lot 20 and the west sixteen feet of lot 21 were twice included in the deeds so made. This mistake occurred by putting the wrong number of the lot in each of the last mentioned deeds. By mistake, or fraud of Haerther, these three deeds said nothing about the incumbrances.

Before the deed to Bertha Harder was delivered to her, the premises therein described were released to the appellee Theresa, from the trust deeds by Adolph Loeb, under

Hazle v. Bondy.

authority from the then holder of the notes, upon a deposit by Haerther with Loeb's bank of \$1,500, to remain without interest until the incumbrances were paid, "as security on account of released deed."

November 5, 1894, the appellees executed and delivered to Haerther a quit-claim deed purporting to convey to him the west thirty-three feet of lot 20 and the east thirty-four feet of lot 21, subject to the incumbrances of the trust deeds.

After the notes were due, Hazel bought them from the holder through the Loeb bank, paying in cash the amount due upon them in excess of the deposit, *i. e.*, \$3,105.50 unpaid interest having accrued.

Hazle acted by an agent, assisted by J. R. Ward, the then owner of the west thirty-three feet of lot 20, and as part of the same transaction Adolph Loeb released to Ward the trust deed as to those thirty-three feet.

April 17, 1896, Hazle entered judgment upon the notes and issued executions which remain wholly unsatisfied.

The present owners of the two lots derive their title from Haerther. In fact, such owners have no title at law to the west sixteen feet of lot 20 and the east seventeen feet of lot 21, except through the first deed of April 6, 1894, of the appellees to Haerther, which conveyed the property subject to the incumbrances. That deed carried to Haerther the title which effectually passed by deeds from him under which the present owners hold. *Gillespie v. Gillespie*, 159 Ill. 84.

No part of the lots 20 and 21 is now subject to sale under an execution upon the judgments against the appellees, for they had parted with all title long before the judgments.

But if by the conduct of the holders of the notes, either directly or through authorized agents, matters have become complicated, so that the amount due upon the notes is uncertain, they have the right to call upon a court of equity to adjust the equities.

Under these facts the appellant Schnur, who is the owner of the east thirty-four feet of lot 21, filed a bill, the object of which is to discharge his property from the incumbrance.

The appellees filed a cross-bill to cut down the amount

to be paid to Hazle, and for general relief. All parties in interest were before the court on appropriate pleadings, and the decree was that by the releases the incumbrances were extinguished as to the Harder and Ward premises, but remained a lien upon the east seventeen feet of Schnur's. That the amount Hazle was entitled to was \$1,742.73. That the appellees have leave to pay that sum in full satisfaction of Hazle, and should be reimbursed by the proceeds of a sale of that seventeen feet.

In our judgment that decree is right in all its parts—no errors in computation being alleged.

Hazle, buying the notes after maturity, took them subject to all equities of the appellees.

Taking the deposit by Haerther of \$1,500 as security—another name for indemnity—was notice of the effect that release might have upon parties who might be affected by it. *Young v. Marshall*, 8 Bing. 43, 21 E. C. L. 437.

Hazle used that deposit as so much of the purchase money when he bought the notes, and it was by his concurrence that the release to Ward was given. Hazle has, therefore, nothing to complain of. Schnur has no real title to his thirty-four feet, and no apparent title to the east seventeen feet of that thirty-four feet, except through deeds subject to the incumbrances.

The decree is affirmed.

MR. JUSTICE WATERMAN dissents.

Chicago Great Western Railway Co. v. Thomas Mitchell.

1. **VERDICTS—Upon Conflicting Evidence.**—The evidence in this case was to some extent conflicting, yet was such that the jury had a right to find, as it did, that the accident was brought about by the negligence of appellant, and their verdict must stand.

2. **NEGLIGENCE—Not Excused by Co-operating Negligence of Third Party.**—The fact that the owners of a railroad track upon which a col-

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lision occurred were also negligent, does not excuse the negligence of another company using such track under an agreement with the owners.

3. AMENDMENTS—*Effect of Failure to Make Actual Correction of Paper.*—An action for personal injuries was brought and a declaration filed against two defendants. Afterward the suit was dismissed as to one of the defendants, and an order made that “all papers and proceedings be and are hereby amended by discontinuing” as to such defendant. *Held*, that the fact that the amendments were not actually made upon the declaration itself did not constitute error.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

HENRY A. GARDNER, attorney for appellant.

FRANK SCALES, attorney for appellee; ALBERT M. CROSS, of counsel.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The Chicago and Northern Pacific Railroad Company owns a railroad terminal in Chicago, which is operated by it under rules, regulations and time tables exclusively its own. The Chicago Great Western Railway Company is a licensee of the Chicago and Northern Pacific Company, and uses the said railroad terminal under the said rules, regulations and time tables of the Chicago and Northern Pacific Company and under its directions.

The plaintiff was injured in the railroad yard which lies just west of the Chicago river and north of 12th street. There are probably 500 engines run in and out of this yard daily. Many trains are made up in this yard preparatory to starting upon their journeys; there is a round-house, and many tracks converging and running into other tracks running parallel to each other.

The plaintiff being, as a carpenter, in the employ of the receivers of the Northern Pacific Railroad Company, was, upon the morning of the accident, taken by it upon one of its engines to be carried to the place where he was to work.

Proceeding along, the engine upon which plaintiff was riding came into collision with an engine of the appellant upon the track of the Northern Pacific Railroad Company, and consequently at a place where both engines should have been running under the rules and regulations of the Northern Pacific Railroad Company.

To avoid being crushed by the collision, plaintiff, immediately before it happened, jumped from the engine upon which he was riding, and thereby sustained injuries on account of which this action was brought.

It is quite evident that the persons in control of each of the engines were at fault. The engine of the Northern Pacific Railroad Company was out of order, its brakes being not in the condition they should have been. This engine was, it appears, running upon a regular time schedule, and would seem to have had the right of way; so that it was the duty of the managers of the engine of appellant to keep out of the way.

The engineer in charge of appellant's locomotive, seeing that a collision was imminent, reversed his engine in such a manner that the wheels revolved rapidly without retarding the engine, as they would have done had the engine not been completely reversed.

It also appears that appellant's engine was carrying at the time but fifty pounds of steam, and consequently did not respond to the efforts of its engineer as it would have done had it been carrying 120 pounds. It is in evidence that it is not safe for an engine to go upon the tracks at the point where this accident occurred with less than from 120 to 140 pounds of steam, in order that it may be able to respond quickly, and so get out of the way of anything likely to come into collision with it.

Appellant's engineer seems to have been negligent in not keeping a proper lookout for the approach of locomotives belonging to the Northern Pacific Railroad Company, as it was his duty to do.

The evidence was to some extent conflicting, yet was such that the jury had a right to find, as it did, that the

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accident was brought about by the negligence of appellant. It is quite true that it appears that the receivers of the Northern Pacific Railroad Company, who were then operating such road, were also negligent, but their negligence does not constitute any defense for appellant.

It is very evident that the accident occurred at a place where the engineer of each locomotive was bound to exercise great vigilance and care to prevent a collision.

The evidence warranted the jury in finding that appellant's engineer was negligent.

The action was brought and a declaration filed against both appellant and the receivers of the Chicago and Northern Pacific Railroad Company. Afterward the suit as to the receivers of the Northern Pacific Railroad Company was dismissed, and an order made that "all papers and proceedings be and are hereby amended by discontinuing as to such receivers."

Although such amendment was not actually made upon the declaration itself, yet we think that the record presents no error in that regard.

The fact that the appellee might have recovered against such receivers, and that their negligence was probably greater than that of appellant, constituted no reason for the rendering of a verdict in favor of appellant, and constitutes none for the reversal of the judgment entered against it.

The judgment of the Superior Court is affirmed.

J. F. Brady v. Charles T. Loring, for Use of, etc.

1. VERDICTS—*Against the Weight of the Evidence.*—The court discusses the evidence, and hold that the verdict of the jury is against the clear preponderance of the evidence, and that the judgment must be reversed.

Transcript, from a justice of the peace. Appeal from the County Court of Cook County; the Hon. WALTER W. WOOD, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

McDANNOLD & PHELPS, attorneys for appellant.

FERGUSON & GOODNOW, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The only question in this case is whether appellant, who had become indebted to one Charles T. Loring, and who has paid him in full, had notice when he made such payment that the claim of said Loring had been by him assigned to the Osburn Electric Supply Company; if he had, then the judgment of the County Court must be affirmed; otherwise, it should be reversed. The only evidence that he did have such notice is the testimony of the president of the Osburn Supply Company, as follows:

"I first saw Mr. Brady in reference to this contract when Mr. Loring came after me—some time after the assignment of the money had been made—in July, 1895, and I went with him to Brady's office to receive money on the contract. The conversation which took place between us was up stairs, between Loring, Brady and myself, and we had gone up there to see some of the workmen who were insisting on their money before Brady would consent to pay over anything to me. I did not show Brady the assignment; in fact, I do not believe I had it with me, although we talked about it, and he, Brady, desired a receipt from both Mr. Loring and myself for money paid over to me on the assignment, knowing that we were furnishing Loring the material to fix up the saloon. After we had talked about the matter up stairs we came downstairs, and Brady told his clerk, Mr. McCarty, to make out a check payable to the Osburn Electric Supply Company for two hundred dollars. This check I received, and both Mr. Loring and myself, as president of the Osburn Supply Company, signed a receipt to Mr. Brady for the two hundred dollars, to apply on account for the contract for wiring the saloon." * * * "At the time I went to see Brady and he paid me the two hundred dollars, I, as I remember it, did not have the assignment of the con-

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tract with me, and Brady did not see it. I think Brady knew of the assignment."

The utmost, as to notice to Brady, that thus appears, is that the assignment was "talked about," and probably by or in the presence of Brady. The statements made from which the witness testifies (infers) that the assignment was talked about, is not shown.

On the other hand, Brady testifies that he never had any notice of the assignment of the account.

His acts in paying the full amount to Loring strongly corroborate his testimony.

The finding of the jury is opposed to the clear preponderance of the evidence, and the judgment of the County Court is reversed and the cause remanded.

Ernst Tosetti Brewing Co. v. David Rosenheim.

1. APPELLATE COURT PRACTICE—*Abstract Must Show Errors Com-
plained of.*—Alleged errors, not based on anything appearing in the
abstract of the record, will not be considered by this court.

Transcript, from a justice of the peace. Appeal from the Circuit
Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding.
Heard in this court at the March term, 1897. Affirmed. Opinion filed
May 24, 1897.

JOSEPH H. MUHLKE, attorney for appellant.

W. A. SHERIDAN, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION
OF THE COURT.

Upon appeal from a justice's judgment to the Circuit
Court the appellant was subjected to a verdict and judg-
ment for \$75 for rent for the month of July, 1896, under
what we conjecture were the terms of a lease referred to by
witnesses, and which was, by name at least, offered in evi-

dence by the appellee, and the signatures thereto identified as being those of the appellant and appellee respectively.

The principal error that is argued by appellant is the refusal by the court to admit in evidence what is spoken of as "the old lease," which, it is said, is the one referred to in the following language read by appellant's counsel from something spoken of as the lease offered in evidence by the appellee:

"This lease is given for the express purpose of, and no other, of carrying out the terms of a certain lease, executed between one Robert Excell, and one Peter Foy, dated January 25, 1892; assigned by Foy to lessee herein, and by Excell to lessor herein, and is intended to invest said lessee with all the rights acquired by such assignment and attornment to lessor thereunder, and no other rights, and to that end shall be construed."

The abstract refers to four exhibits, called respectively "lease," "old lease," "plat," and "a letter dated January 4, 1896, received from David Rosenheim, the signature to which is admitted by said Rosenheim," but no contents of either exhibit is shown, unless the foregoing quotation be considered as a part of the "lease."

It is not claimed that the old lease was competent evidence of anything unless it were made so by the paragraph quoted, that was read by appellant's counsel at the trial. If such paragraph were a part of a lease under which appellee claimed to hold appellant for rent, the lease containing it, as well as the old lease there referred to, should, in order that we might intelligently pass upon the question, be shown to us in the manner required by the rules of the court concerning abstracts.

The appellant, in its brief, complaining that the old lease was not admitted in evidence, has furnished us with an apt inquiry descriptive of the condition in which the court is left by the failure to furnish a sufficient abstract.

"How are we to know if the 'lessee is invested with all the rights acquired by such assignment and attornment' unless we have the old lease, showing what those rights were?"

The rule concerning the preparation of abstracts of the record in causes appealed to the Supreme Court, and to this court, is a living one, and has been so often applied that now to decline its enforcement would be to lay ourselves open to the charge of partiality. It is, that alleged errors, not based on anything appearing in the abstract, will not be considered by the court. See *Shively v. Hettinger*, 67 Ill. App. 278, from which former decisions may be traced.

The Circuit Court having ruled adversely to appellant's contention on the question, we must presume such ruling to be correct under the law until the contrary is made to appear to us, which not so appearing, the alleged error must be held not to be well assigned.

The other points argued by appellant hang upon the one question mentioned, and must, therefore, fall with it.

The judgment of the Circuit Court is affirmed.

Chicago & Alton Railroad Company v. Louisa Robbins.

1. *APPEALS—Involving a Freehold.*—In an action of trespass *quare clausum fregit*, in which a plea of *liberum tenementum* is filed and issue taken thereon, a freehold is involved, and this court has no jurisdiction of an appeal.

Trespass, quare clausum fregit. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1897. Appeal dismissed. Opinion filed May 24, 1897.

JOHN M. SOUTHWORTH, attorney for appellant.

H. T. HELM, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee sued the appellant in trespass *qu. cl.* The appellant pleaded *lib. ten.* Issue was taken on that.

A freehold is involved, and this court has no jurisdiction of this appeal. It is dismissed. *West Chicago St. R. R. v. Morrison*, 54 Ill. App. 556; 160 Ill. 288.

70 196
85 59270 196
91 58170 196
108 4122**Gustav Richter v. Cicero & Proviso St. Ry. Co.**

1. **NEGLIGENCE—*Frightening Horses.***—In an action for damages, occasioned by running a street railway car against plaintiff's wagon, where the evidence shows that the car was stopped to allow a funeral procession to pass, but was started before the plaintiff's wagon had passed, and that by reason thereof his horse became frightened and backed the wagon in front of the car, it is error to instruct the jury to find for the defendant.

2. **SAME—*Pleading—Particularity of Statement Required in Declaration.***—An allegation in a declaration that a motorman, seeing that a car was frightening and making unmanageable a horse attached to a wagon and traveling in close proximity to the track, did not lessen the speed and noise of the car, but negligently persisted in and continued the same, is a sufficiently specific statement of negligence.

3. **PLEADING—*What is Not Denied by the General Issue.***—If, in a suit against a street railway company, a plea of the general issue only be interposed to a declaration setting up an injury, and alleging that at the time of the injury the defendant company was operating the particular line of railway mentioned, and that the operatives in charge of the car causing the injury were its servants and employees, the two latter facts need not be proved.

4. **STARE DECISIS—*When Dicta Should be Followed.***—Subordinate tribunals should attach great weight to apparently deliberate utterances, though *dicta* of the Supreme Court, and should apply them to cases involving the same question.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

J. HENRY KRAFT, attorney for appellant.

ALEXANDER SULLIVAN, attorney for appellee; EDWARD J. MCARDLE, of counsel.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellant sued the appellee to recover damages sustained by himself personally, and also for the breaking of the vehicle in which he was riding, by being run into by an

electric car alleged to be owned and operated by appellee, and at the conclusion of his evidence the court took the case from the jury by a peremptory instruction to find the appellee not guilty.

The accident happened on West Madison street, in the outskirts of Chicago, beyond the reach of pavements. The railroad in question consisted of double tracks lying, presumably, in about the middle of the roadway, on either side of which was a ditch five or six feet deep. The appellee was a farmer, and with his wagon containing four members of his family besides himself, formed one of a funeral procession of a dozen or more carriages and farmers' wagons. The procession was moving west in the north car track. The carriages were in the front of the procession, and the wagons and buggies came after them.

The electric car was coming east on the south track. As the car and the head of the procession met, the car stopped in response to motions and calls from the procession, and remained at a stand-still until the carriages forming the front part of the procession passed. It then started up, and the horses attached to the wagons and buggies became frightened and commenced to back up against those behind. The appellant's horse, although usually docile, became unmanageable and backed the wagon in which appellant and his family were riding out of the north track in which it had been running, upon and across the south track and in front of the car, and the wagon became crushed and the occupants thrown out.

The fair inference from all the evidence is that because of the ditches the wagons could not have been driven in safety to one side of the tracks.

All of the horses were frightened, but appellant's outfit was the only one that became injured.

Such facts made a clear case for the jury. *C. & A. R. R. Co. v. Hogarth*, 38 Ill. 372; *Citizens Street Ry. Co. v. Lowe*, 12 Ind. App. 47, and other cases there cited; *L., N. A. & C. Ry. Co. v. Stanger*, 7 Ind. App. 179.

Appellee, however, insists that there is no sufficient spe-

cific allegation of negligence contained in the declaration. The gist of the negligence charged in each of the two counts is that the motorman, seeing that the car was frightening and making the horse unmanageable, did not slacken and lessen the speed and noise of the car, but negligently persisted in and continued the same, and thereby the injury.

The authorities we have cited are ample to sustain the declaration.

It is also urged here, although it does not appear to have been raised at the trial, that there was no evidence that connected the appellee with the operation of the car in question.

If such evidence were necessary under the pleadings we should feel constrained to hold with the appellee on that point.

The declaration alleged the running and operation of the car and railway in question by the appellee, and to each of the counts, so alleged, the appellee pleaded only the general issue.

The Supreme Court, in the case of *McNulta v. Lockridge*, 137 Ill. 270, at pages 285-6, has spoken upon a suppositious case of pleadings like that here existing somewhat in opposition to the general rule as formerly understood in regard to what is admitted by a plea of the general issue, as follows:

"In the case last stated it would be impliedly conceded by the pleadings, not only that the Illinois Central Railroad Company was a corporation, but also that at the time of the alleged injury it was operating the particular line of railroad mentioned in the declaration, and that the operatives in charge of the train being run on said road were its servants and employees." Although such utterance was argumentative and illustrative rather than by way of decision, still the point there considered being what was admitted by a plea of the general issue alone to a declaration alleging not only the character and capacity in which the defendant was sued, but that he was in possession of and operating the alleged line of railway, and that the employes operating the

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trains on the road were his servants; and considering the great weight all subordinate tribunals should attach to apparently deliberate utterances, though *dicta*, of the Supreme Court, we feel that we should make application of them to cases involving the same question.

There should in justice be another trial of the case, and the judgment of the Superior Court is therefore reversed and the cause remanded.

C. Henning & Sons v. Ella Williams.

1. BILL OF EXCEPTIONS—*Should not Omit Matters that May Have Affected the Result.*—Where an examination of the record reveals that an account book introduced in evidence is not incorporated in the bill of exceptions and the court is not able to say that the contents of the book were not important enough to materially affect the result, the judgment can not be held to be against the weight of the evidence. ,

Assumpsit, on a contract of sale. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

MEEK, MEEK & COCHRANE, attorneys for appellant.

EDWARD J. WALSH, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit, the propriety of the judgment obtained in which depends almost entirely upon disputed questions of fact, concerning which the evidence was conflicting.

An examination of the record reveals that an account book introduced in evidence is not incorporated in the bill of exceptions.

We are not able, from an examination of the testimony,

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to say that the contents of this book were not so important as to materially affect the result, and consequently can not know that, upon the evidence presented to the court below, the conclusion there reached was incorrect.

The omission of the contents of this book from the record is urged by appellee as a reason why the judgment should be affirmed.

To this no satisfactory reply has been made.

Perceiving in the record no error warranting a reversal of the judgment, it is affirmed.

Edwin C. Langhenry, Successor in Trust, etc., v. Chicago Trust and Savings Bank et. al.

1. *TROVER—Character of the Action—Showing Necessary to Maintain.*—Trover is a possessory action, and to recover the plaintiff must show that he has a special or general property in the thing converted and the right to its possession, and he must recover, if at all, on the strength of his own title, without regard to the weakness of that of his adversary.

2. *SAME—Proof Necessary to Support.*—To support an action of trover by one having either a general or special property he must prove a conversion thereof at a time when the right of possession existed in him. It is not enough that he has a mere right of action or a right to take possession at a future day.

Trover, for the value of certain promissory notes. Appeal from the Circuit Court of Cook County: the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

MCGLOSSON & BEITLER and JAMES R. WARD, attorneys for appellant.

CRATTY BROS., JARVIS & CLEVELAND, attorneys for appellees.

In order to support an action of trover the plaintiff must show that at the same time of the conversion he had a

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property in the chattels, either general or special. He must also have had, at the time of the conversion, the actual possession or the right to immediate possession of the property. 1 Chitty on Pleadings, *147, *150; 2 Greenleaf on Ev., 14th Ed., Secs. 636-640; Puterbaugh's Common Law (1897), 290-295, 296; Barton v. Dunning, 6 Blackf. 209; Davidson v. Waldron, 31 Ill. 120, 129; Pressley v. Powers, 82 Ill. 125, 126-128; Forth v. Pursley, 82 Ill. 152; Owens v. Weedmann, 82 Ill. 409; Honrood v. Smith, 2 T. R. 353; Hayes v. Ins. Co., 125 Ill. 626-633; Stock Yards Co. v. Malory, 157 Ill. 554-560.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action of trover, brought by appellant as successor in trust, etc., to recover \$7,495.75, being the value of certain notes which were deposited with the appellees by one Benjamin F. Clarke, as collateral security to his individual note for money borrowed.

About April 1, 1890, sixteen persons, including the appellant, constituting what is popularly called a syndicate, bought sixty-four lots in Block "S" in Morgan Park, and on that day entered into a written agreement between themselves and said Benjamin F. Clarke whereby Clarke was constituted trustee, and the appellant successor in trust, to take the title to said premises as trustees for the others, and sell the same when directed, and pay over to each party his proportion of the proceeds of sale according to his specified interest.

The land that was bought was conveyed to "Benjamin F. Clarke, trustee, as aforesaid, then to Edwin C. Langhenry, who shall be successor in trust."

At least some of the lots were sold, and notes secured by trust deeds were received by Clarke in part payment.

It seems to have been sufficiently established that all of the notes in question were received by Clarke in his capacity as trustee under said agreement, and were pledged, or deposited as collateral security by him, to secure an individual

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indebtedness of his own to the appellees, without the consent or knowledge of any of the members of the syndicate, and without any benefit therefrom to them or any of them.

Afterward, Clarke formally renounced his trusteeship in favor of appellant as successor in trust. Thereupon demand upon appellees for the notes was made, which being refused, this action in trover was begun.

We need not discuss whether appellees had notice of the character in which Clarke held the notes, for it is clear that appellant could not maintain trover for them.

If, at the time the pledge was made, appellees took the notes without notice of Clarke's trusteeship concerning them, the possession of them then taken by appellees was rightful and subsequent notice would not make it wrongful; and if they were taken with notice, then their possession was wrongful and conversion instantly followed.

In neither case could appellant maintain trover.

Trover is a possessory action, and to recover the plaintiff must show he has a special or general property in the thing converted and the right to its possession, and he must recover, if at all, on the strength of his own title, without regard to the weakness of that of his adversary. *Davidson v. Waldron*, 31 Ill. 120.

The notes were never in the possession of appellant, and he never saw them. He was only to become successor to Clarke in the trusteeship after Clarke ceased to be trustee, and that did not happen, nor did appellant assume to act as trustee until several weeks after the notes were pledged and their alleged conversion had taken place.

The refusal to surrender the notes upon demand by appellant did not make the conversion occur as of that date if appellees' taking of them from Clarke was wrongful, for in such case the conversion was identical with the act of taking; nor did such demand and refusal change a taking, rightful at first, into a wrongful act as of the date of demand.

At the utmost, appellant never had more than a special property in the notes, and to support an action of trover by

one having either a general or special property in the thing he must prove a conversion thereof at a time when the right of possession existed in him.

It is essential that the plaintiff should have, at the time of the conversion, not only the right of property in the chattel or thing, but also the right to its immediate possession. It is not enough that he has a mere right of action, or a right to take possession at some future day. *Puterbaugh's Pl. and Pr.* (7th Ed.) 290, and cases there cited.

"So a person having a special property in the goods may support trover against a stranger who takes them out of his actual possession." 1 *Chitty on Pleading*, star page 151.

If a plaintiff "has only a special property, there must ordinarily be evidence of actual possession." 2 *Greenleaf on Evid.* (13th Ed.), Sec. 640.

Whether trover might be maintained by Clarke is a question not in this record, although it would seem that it might not be, because of his own wrongful act in pledging the notes. And as to the action being maintainable in the names of the members of the syndicate, it would seem that it would not be because of their lack of right to possession of them.

There may be a remedy in equity, although difficulty therein may easily be seen, but we are not called upon to advise, and do not intend to express an opinion except that the appellant may not maintain the action. The judgment of the Circuit Court is accordingly affirmed.

MR. JUSTICE GARY.

I concur in the result for reasons shortly stated thus:

The deed, under which the appellant is successor to Clarke as trustee, provides only that the appellant shall be such successor "in case of the death or other legal disability of" Clarke; and neither insolvency, nor abuse of the powers conferred, is a legal disability, though either may furnish ground for removal.

Therefore, under the deed, it can not be said that the appellant has title to the land even, much less to the notes, concerning which the deed contains no provision.

The same reason applies to an agreement made by the members of the syndicate among themselves, contemporaneous with the deed, except that in the agreement there is a provision that the trustee shall "pay over to each party on sale of said property, their proportion of all proceeds of all sales and profits as fast as the property is sold. That was a duty incumbent upon Clarke, which, as to the notes in controversy, never charged the appellant.

Now, waiving the question whether Clarke could confer upon the appellant any authority to revoke or repudiate wrongful acts done by Clarke, it is clear that he never tried so to do. The deed by which Clark renounced, conveys "all his right, title and interest in and to" the land there described, and closes with the statement: "It being the intention of the said Benj. F. Clarke to renounce the said trusteeship, and to sell, convey and assign to Edwin C. Langhenry, his successor in trust, the legal title to said property above described."

So the notes have never been the subject of any source of title to the appellant.

Whether the property in chattels and choses in action, adversely held, may be transferred by one who has been wronged to an extent that entitles him to maintain trover (for which there seems to be authority—Benjamin on Sales, 39)—and what the transferee may do thereafter, need not be discussed. The judgment appealed from is right, and whether it be so for the right reason, is immaterial.

MR. JUSTICE WATERMAN.

There is no pretense that appellee took these notes to hold in trust for Mr. Clarke or any one else. It is undisputed that it purchased them for its own use and purpose. If, therefore, there was a conversion by appellee, it took place when it so obtained the notes. Mr. Clarke was the legal holder to these notes, they having been received by him on account of the sale of certain property which he held in trust for the estate of P. P. Plumley and others; the trusteeship of said Clarke as to the notes, being his un-

City of Evanston v. Meyers.

dertaking to pay to each of the *cestuis que trust*, on sale of said real estate, their proportion of all proceeds of all sales and profits as fast as the property should be sold.

Clarke, it would seem, in bad faith converted these notes, or their proceeds, to his own use. When appellee purchased and took possession of these notes—that is, if at all, converted them—appellant had no right to maintain an action of trover for them.

Whatever right appellant has to these notes or their proceeds, accrued long after appellee obtained the notes for its own use.

There was, as the Circuit Court found, no sufficient evidence warranting the submission to the jury of the question of whether appellee received these notes in bad faith, so as to make it liable to respond for their value to the legal owner of the same.

I am of the opinion that, for the reasons above stated, the judgment of the Circuit Court should be affirmed.

The City of Evanston v. W. H. Meyers.

70 205
172 286

1. **CRIMINAL LAW—Inducing People to Violate Ordinances.**—In a prosecution for selling liquor in violation of a city ordinance, it appeared that the city employed two persons to buy beer of the defendant, giving them the money with which to purchase it. *Held*, that the city had procured the commission of the offense and should not be allowed to reap a reward for its diligence in inducing the defendant to violate its own ordinance.

Complaint, before a justice of the peace. Appeal from the Criminal Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

STATEMENT OF THE CASE.

The Four Mile League is an association formed for the purpose of enforcing the law relating to the sale of intoxi-

cating liquors within four miles of the Northwestern University in Evanston, within which limits the law forbids such sale. The Four Mile League, in 1896, furnished the chief of police of the city of Evanston with funds to pay the expense of procuring evidence against persons engaged in the liquor traffic within the four-mile limit. The funds furnished by the League were added to the funds appropriated for the same purpose by the city of Evanston, and used by the chief of police of said city of Evanston to pay John Denvir and Tony Collignon for services and expenses in detecting persons engaged in selling liquor in the city of Evanston, or within the four-mile limits, and procuring the evidence against them by making purchases of liquor.

On July 9, 1896, John Denvir saw the defendant in the city of Evanston, and paid him fifty cents for a dozen bottles of lager beer. The beer was at once delivered to the witness, by the defendant from the wagon of defendant. The transaction was witnessed by Tony Collignon and Bob Kernohan, who were not more than one hundred feet away, and afterward drank a portion of the beer.

The city of Evanston, by its city council, adopted the following ordinance, being Sec. 646 of the Revised Ordinances of 1893, of the city of Evanston :

"Whoever shall, by himself or another, either as principal, agent, clerk, servant or otherwise, directly or indirectly sell, barter, exchange or give away within the corporate limits of said city any ale, porter, beer, weiss-beer, lager beer, kimmel, wine, rum, brandy, gin, whiskey, schnapps, bitters, cider, hard cider, manufactured cider, or any spirituous, vinous, malt, fermented, mixed or intoxicating liquor, or any mixture, part of which is any of said liquor, or any intoxicating drinks, shall be fined not less than ten dollars nor more than two hundred dollars for each offense."

GEORGE S. BAKER, attorney for appellant.

WILLIAMS & KRAFT, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The offense for which appellee was prosecuted was one induced by the city of Evanston. It is quite true that there is reason to believe that appellee was ready and willing to violate the ordinance, without being solicited by the city to do so; this is not, however, sufficient to constitute an offense. Parties can not be convicted of criminal offenses merely because they have the ability and are suspected of a willingness to violate the law.

It appears that the city employed two minors, furnished them with money with which to buy beer of appellee, and this having been done, permitted these boys to go to an ice house behind a church and drink the beer.

The act of appellee was induced by appellant. Indeed, it is not too much to say that appellant not only induced but sought to have appellee violate its ordinance. Having procured the commission of an offense, appellant now seeks to compel the payment of money, a fine, to it; to reap a reward for its diligence in inducing appellee not only to violate its ordinance, but the law of the State against selling liquor to minors.

The distinction between employing detectives to ferret out and ascertain who has been guilty of crime, and endeavoring to bring about the commission of criminal acts, is so obvious as not to require comment.

The ordinance forbids the giving away of cider, weiss-beer, or any vinous, fermented or malt liquor. Can it be claimed that the city could impose a fine upon one who at its request gave wine or cider to a guest?

We do not mean to be understood as intimating that if a citizen of Evanston purchased beer within the city, or received it as a gift, the vendor or donor may not be convicted, although the object of the recipient in receiving was to prosecute him from whom the intoxicant was obtained.

Neither a public officer nor a municipality may procure or encourage the commission of crime. *Love v. The People*, 160 Ill. 501; *Saunders v. The People*, 38 Mich. 222;

United States v. Whittier, 5 Dillon, 35; Williams v. The State of Georgia, 55 Ga. 395; People v. McCord, 76 Mich. 206.

The judgment of the Criminal Court is affirmed.

MR. JUSTICE GARY.

While I do not dissent from the opinion of Judge Waterman, I protest that he is not competent to write it, inasmuch as he confesses that he has partaken of the hospitality of highly respected citizens of Evanston in breach of the ordinance forbidding the giving away of cheering beverages.

Central School Supply House v. James Donovan et al.

1. *PROMISSORY NOTES—Indorsed in Blank—Possession Evidence of Title.*—Promissory notes indorsed in blank pass by delivery, and possession of such notes is *prima facie* evidence of title thereto.

2. *SAME.—First Assignment to Bona Fide Holder Without Notice of Defects Fixes Character of.*—The character of a promissory note, as negotiable paper, is established when it is acquired by a *bona fide* holder before maturity, and notice of original defects does not affect subsequent holders either before or after maturity.

Assumpsit, on promissory notes. Appeal from the Superior Court of Cook County; the Hon. NATHANIEL C. SEARS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

ALBERT N. EASTMAN, attorney for appellant.

TENNEY, McCONNELL & COFFREN and WM. J. AMMEN, attorneys for appellees.

Bills and notes indorsed in blank pass by delivery. Possession of same is *prima facie* proof of title thereto. Purchaser is not bound to inquire as to title. *Morris v. Preston*, 93 Ill. 215; *Palmer v. Nassau Bank*, 78 Ill. 380; see also cases cited in Vol. 2, *Starr & Curtis Stat.*, pages 2793-4.

A note payable to the maker's order and indorsed by him

Central School Supply House v. Donovan.

in blank is in legal effect a note payable to bearer, and is transferable by delivery. *Jones v. Shapera* (C. C. A.), 57 Fed. Rep. 457; 6 C. C. A. 422.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The question presented in this case is as to the right of the transferee of a negotiable promissory note, who, with notice of a defense, purchased the instrument from a *bona fide* holder, who acquired it before it became due.

Promissory notes indorsed in blank pass by delivery.

Possession of such notes is *prima facie* evidence of title thereto. *Morris v. Preston*, 93 Ill. 215; *Palmer v. Nassau Bank*, 78 Ill. 380.

The character of a promissory note as negotiable paper is established when it is acquired by a *bona fide* holder before maturity, and notice of original defects does not affect subsequent holders either before or after maturity. *Daniels on Neg. Instruments*, Secs. 728-803; *Story on Prom. Notes*, Sec. 191; *Simon v. Merritt*, 33 Ia. 537; *Commissioners v. Clark*, 94 U. S. 278; *Rice v. Van Ackere*, 22 Ill. App. 588; Vol. 2, (6th Ed.), *Parsons on Contracts*, 242-253; *Woodworth v. Huntoon*, 40 Ill. 131; *Wilder v. DeWolf*, 24 Ill. 190; *Gillham v. The State Bank of Illinois*, 2 Scam. 245.

That appellees did not see fit to fill in the indorsement by Geo. H. Taylor & Co., so as to make it a special transfer, is immaterial.

By the indorsements it appears that appellees took title through the payees, Geo. H. Taylor & Co.; the introduction of the notes thus indorsed made a *prima facie* case for appellees. By evidence introduced by appellant it appeared that the Hide & Leather Bank purchased these notes before they became due, and that appellee bought the paper from the bank before the notes matured.

Appellant does not contend that as against the bank it had any defense; its position therefore is, that the bank could not transfer its right to appellee, a contention for which there is, so far as we are aware, no authority.

All that is held in *Kost v. Bender*, 25 Mich. 515, is that where the maker of a promissory note has a valid defense as against the person to whom upon its face it is payable, if such payee, after assignment to a *bona fide* holder, again acquire and bring suit upon the note, the law, to avoid circuity of action, will allow the maker to set up that he was induced by the fraudulent representation of the payee, plaintiff, to execute the note.

The judgment of the Superior Court is affirmed.

William J. Moore v. Merchants Loan and Trust Co.

1. PLEADING—*After Issues are Made Up*.—Where the issues have been made up, and the time at which a defendant was required to plead has passed, such defendant should obtain leave of court before filing an additional plea.

2. VERDICTS—*Will Not Be Disturbed when Warranted by the Evidence*.—The court holds that there was evidence which warranted the jury in finding as it did in this case, and that there is no sufficient reason for reversing its finding upon the questions of fact.

3. SAME—*Power of Court to Order Correction of*.—A verdict for the face of a note and interest is the same in effect as a verdict for the amount due on such note, and it is not error to direct the jury to withdraw and make the verdict formally correct, even after they have been allowed to separate.

Assumpsit, against the guarantors of a promissory note. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

STATEMENT OF THE CASE.

This was a suit brought by the appellee Merchants Loan and Trust Company, against the appellant William J. Moore, surviving partner of the firm of Moore Brothers, upon an alleged guaranty of a promissory note executed by Potomac Apartment Company, a duly organized corporation. Said promissory note was executed by said Potomac

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Apartment Company and delivered to New Era Gas Fuel Appliance Company, to whom it was payable. The note, at the time of its execution and delivery, had indorsed upon it the words "Moore Brothers," this indorsement being made by James E. Moore, since deceased, who was at that time president of the Potomac Apartment Company and one of the copartners in the firm of Moore Brothers. The note was discounted by appellee before maturity, the proceeds of said discount being placed to the credit of New Era Gas Fuel Appliance Company, and subsequently checked out by it.

The defendants, James E. Moore and William J. Moore, appeared on September 16, 1893, and filed five pleas to the plaintiff's declaration, of which the first plea was the general issue, and the other four were special.

The second and third pleas were pleas alleging failure of consideration, and a demurrer to them was sustained. The fourth and fifth pleas set up that the note and guaranty were given by the Potomac Apartment Company to the New Era Gas Fuel Appliance Company, and that the consideration upon which the note was given had failed, and that the plaintiff company was not a *bona fide* holder for value.

Upon issue being joined upon the first, fourth and fifth pleas the case was tried in October, 1894, and resulted in a verdict for the plaintiff for the sum of eight hundred and seventy-six dollars and thirty-eight cents (\$876.38).

A new trial was granted, and before the case again came on for a hearing, James E. Moore, the senior partner of Moore Bros., died, and the cause was ordered to proceed against the other defendant, William J. Moore, as surviving partner.

It appears from the record that on October 20, 1896, the day before the case came on for trial the second time, Messrs. Beach & Beach (who had previously, on the 3d day of September, 1895, filed a second appearance for the defendants without obtaining any withdrawal of the appearance filed by Messrs. Olds & Griffin, who were the original

attorneys for the defendants,) filed in the clerk's office a verified plea by the defendant William J. Moore, denying the execution of the guaranty sued on, verified by William J. Moore.

This plea on the part of William J. Moore, filed in the clerk's office a day before the second trial, was apparently filed without leave of court after the issues had been made up for more than a year, and after the case had been once tried upon the issues so joined.

The second trial resulted in a verdict against the appellant, as follows: "We, the jury, find the issues for the plaintiff, and assess plaintiff's damages at the sum of the face of the note (\$799.56) seven hundred and ninety-nine and 56-100 dollars, with interest at six per cent per annum to date." The verdict was signed by the jury, sealed and delivered to the bailiff in charge on October 20, 1896, after which the jury was allowed to and did separate. The verdict was opened and read upon the convening of court October 21, 1896; the jury were then ordered by the court to retire and correct said verdict. This was objected to by counsel for defendant, because the jury had separated; the objection was overruled by the court and exception taken by the defendant. The jury thereupon retired and presently returned and reported to the court the following: "We, the jury, find the issues for the plaintiff, and assess plaintiff's damages at the sum of nine hundred seventy-three and twenty-eight one-hundredths dollars (\$973.28)," signed by all the jury. Upon which verdict the court entered judgment for the sum of \$973.28.

BEACH & BEACH, attorneys for appellant.

RICH & STONE, attorneys for appellee.

It is well settled by numerous decisions, both of this court and of the Supreme Court that in cases of this kind, where the verdict is informal, the court may either put it in form himself in the presence and with the assent of the jury

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(Clapp v. Martin, 33 Ill. App. 438; Wells v. Ipperson, 48 Ill. App. 580), or he may direct the jury to retire and reform the verdict themselves, as was done in this case. Cleveland, C., C. & St. L. Ry. Co. v. Monaghan, 140 Ill. 474; Smith v. Williams, 22 Ill. 357; Bissell v. Ryan, 23 Ill. 566.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The issues having been made up and the time at which the defendants were required to plead having passed, appellant should have asked leave to file an additional plea; the case, however, was tried as if such leave had been given, and we so treat it.

We see no sufficient reason for reversing the findings of the jury upon the questions of fact.

There was evidence which warranted the jury in finding as it did.

The verdict first rendered by the jury was in effect the same as the second, and the court did not err in directing the jury to withdraw and make the verdict formally correct.

There was evidence from which it might have been found that Moore Brothers were interested in the erection and equipment of the Potomac Apartment Building at the time of the execution of the note upon which their guaranty appears.

We find no error in the record requiring a reversal of the judgment of the Circuit Court, and it is affirmed.

Henry Harms v. Caroline Stier and Henry Stier.

1. **FORCIBLE ENTRY AND DETAINER**—*What the Complaint Need Not State*.—Sec. 5, Chap. 57, R. S., does not require the statement in a forcible entry and detainer complaint of the circumstances under which the defendant entered, but simply that he unlawfully withholds; and on the trial the plaintiff may prove his right to recover under any clause of Sec. 2 of said chapter.

2. **SAME**—*Doubt as to Ground on Which Right of Possession is Based Immaterial*.—If the evidence in a forcible entry and detainer case proves that under one or another of the clauses of Sec. 2, Chap. 57,

R. S., the plaintiff is entitled to recover, but leaves it uncertain under which, he is not to be defeated because of a doubt as to whether the defendant entered as a tenant or as a trespasser.

8. INSTRUCTIONS—*Should Harmonize*.—It can not be known what instruction a jury will follow, and hence the instructions given on behalf of the respective parties should be made to harmonize by the court before they are given to the jury.

Forcible Detainer.—Appeal from the Circuit Court of Cook County: the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

GAGE & DEMING, attorneys for appellant.

OLIVER & MECARTNEY and SIMMONS & WINSTON, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of forcible detainer by the appellant against the appellees, resulting after a jury trial in a judgment for the appellees.

Of the evidence, it is enough to say that it was such as made germane to the case instructions given, among others, at the request of the appellant, as follows:

"8. The jury are instructed that if they find from the evidence that the plaintiff, Henry Harms, was in the peaceable possession of the property described in the amended complaint, and had a house thereon before the commencement of this suit, and that the defendants, without the permission of the plaintiff, went into possession of said property and refused to surrender the possession of said property to the plaintiff upon demand, in writing, then the jury will find the defendants guilty.

9. The jury are instructed that if they find from the evidence that the defendants went into possession of the property described in the complaint in this case, as the tenants of the plaintiff, Henry Harms; and if they further find that after taking possession from the plaintiff, and before the commencement of this suit they disclaimed holding under the plaintiff, and claimed to hold the property under some

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other person, then the jury are instructed that no demand for possession was necessary to be made by the plaintiff on the defendants before the commencement of the suit."

Then on the request of the appellees the court gave, among others, the following instruction:

"6. If you believe from the evidence that the defendants never acknowledged the possession or right of possession to this land in Henry Harms, the plaintiff, and never agreed in the manner above stated in the other instructions to become his tenants thereon, then your verdict must be for the defendants."

This nullified the instruction above, numbered 8.

The statute, Sec. 5, Ch. 57, does not require that the complaint shall state the circumstances under which the defendant entered—but simply that he unlawfully withholds; and on the trial the plaintiff may prove his right to recover under any clause of section 2.

If the evidence proves that under one or another of the clauses of that section the plaintiff is entitled to recover, but leaves uncertain under which of the two, he is not to be defeated because of a doubt whether the defendant entered as a tenant or as a trespasser.

"It can not be known what instructions the jury followed, and hence the instructions given on behalf of the respective parties should be made to harmonize by the court before they are given to the jury," C., B. & Q. R. R. v. Naperville, 166 Ill. 87.

For this error in instructions, the judgment must be reversed, with no intimation of opinion on the merits.

Richard O'S. Burke v. Joseph E. Dunning.

1. JUSTICES OF THE PEACE--*When Judgments by, are Final.*—A transcript of a justice recited a verdict and judgment as follows: "We, the jury, find the issues for the defendant, and upon the verdict the court renders judgment in favor of the defendant against the plaintiff for costs of suit." *Held*, that the justice had no discretion to do anything else after the verdict than render final judgment for the defendant, and

that the judgment for costs should be considered a final judgment, from which an appeal would lie.

2. JUDGMENTS—*Form of, When Final.*—In form a final judgment for a defendant should be that the plaintiff take nothing by his suit, and that the defendant go hence without day.

Transcript, from a justice of the peace. Error to the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Supersedeas denied. Opinion filed May 24, 1897.

M. B. GEARON and D. R. TWOMEY, attorneys for appellant.

No appearance for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The plaintiff in error applies for a supersedeas on a record showing that this case was commenced by the defendant in error against the plaintiff in error before a justice of the peace, and tried there before a jury.

The transcript of the justice recites the verdict and judgment thus: "We, the jury, find the issues for the defendant and upon the verdict *to* the court renders judgment in favor of the defendant against the plaintiff for costs of suit."

The word "*to*" italicised is impertinent and must be rejected as surplusage.

From that judgment the defendant in error appealed to the Circuit Court, where the plaintiff in error entered his appearance, but seems to have neglected the case, as a couple of years afterward the defendant in error took judgment against him after an *ex parte* trial.

There is no bill of exceptions, and the point relied upon by the plaintiff in error is that the judgment merely for costs before the justice was not a final judgment, from which an appeal would lie to the Circuit Court, and therefore the Circuit Court had no jurisdiction.

That in form a final judgment for a defendant should be that the plaintiff take nothing by his suit, and that the defendant go hence without day, is not to be denied. See Sprick v. Washington Co., 3 Nebraska, 253, and authority there cited.

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But the justice had no discretion to do anything else after that verdict than render final judgment for the defendant. *Felter v. Mulliner*, 2 Johns. (N. Y.) 181.

And in this State, a judgment before a justice against the plaintiff for costs, without even saying in whose favor, is a final judgment. *Zimmerman v. Zimmerman*, 15 Ill. 85.

The premise on which the plaintiff in error bases his conclusion failing, his conclusion fails.

The supersedeas is denied.

Benjamin W. Wood v. Ida Carter.

1. **DEEDS**—*A Deed Construed*.—A covenant in a deed granted the right of way over, across and upon a private alley, "to be kept opened and maintained," and reserved "the right of arching over the said alley-way at a height of not less than ten feet from the ground." *Held*, that the word "ground" referred to the surface of the earth as it might be from time to time, and not to the surface as it was in its original state, and that an alley of the agreed width, free from obstructions, and giving free passage to teams and loads able to pass under any covering not less than ten feet above the surface of the alley, must be kept and maintained.

2. **EASEMENTS**—*Abandonment of, by Implication*.—An owner of land is entitled to whatever appurtenances belong to his land, regardless of the mode in which he uses them, and the fact that he builds on his land in such a way as to interfere with the use of an easement can not be held to be an abandonment of it.

Covenant, for a failure to maintain a private alley. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 6, 1897. Rehearing denied. Opinion filed May 24, 1897.

OLIVER & MECARTNEY, attorneys for appellant.

MONK & ELLIOTT, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is an action of covenant by the appellant against the appellee. The only question in the case is upon the con-

struction of words in a warranty deed from William Speight and wife.

By events since the making of the deed the appellant has succeeded to the benefit secured by those words, and the appellee is bound to perform what they require.

The words follow a description in the deed of the premises conveyed, and are as follows :

“ Also the right of way over, across and upon a private alley, to be kept opened and maintained by the said Speights and all future owners of the residue of said sub-lot one, upon the east eight feet nine inches ($8\frac{1}{2}$ feet) of the south thirty-three (33) feet of said sub-lot one; said alley was to be only for the use in common of all the owners and occupants of said sub-lot one, and for the use of no other persons or property soever; said Speight reserving to himself, and such future owners, the right of arching over the said alley-way at a height of not less than ten (10) feet from the ground, thereby making the same a covered passage-way.”

The south thirty-three feet of sub-lot one is the northeast corner of Huron and Clark streets in Chicago, and the premises conveyed were next north thereof.

Huron is an east and west street, so that the premises conveyed have no access to Huron street without this alley.

The principal contention is on the word “ground.”

The appellee insists, and the court held, that it meant the surface of the earth as the aborigines left it, or at latest as it was at the date of the deed, September 15, 1864.

The appellant claims a practicable alley for wagons from Huron street to the premises conveyed, regardless of changes in the surface of Huron street.

That at the date of the deed it was intended that this alley should give access with wagons to the rear of the premises conveyed, can hardly admit of doubt.

Access from Clark street there was—the front was there. The alley is not upon some part of the eight feet nine inches, but upon the whole, one part as much as another. The height, unobstructed, is to be not less than ten feet, and with

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these features it is to be "kept and maintained" by the grantor and his successors. "Ground" most frequently means earth surface; but it also means the lower surface in the space to which the word relates, as the dictionaries teach us, and as popular writers exemplify.

Such an alley as will give free passage from Huron street, with teams and loads that will go under any covering not less than ten feet above the surface of the alley, the appellee must keep and maintain.

The case having been tried without a jury, we would be glad to enter final judgment here; but there is not sufficient data for us to fix the damages to which the appellant is entitled by reason of the breach of the covenant.

The fact of the breach, under our construction of the covenant, is not denied.

The judgment is reversed and the cause remanded.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

This petition calls upon us to take more notice of some circumstances shown in the record than we did in the original opinion.

First. Ten years after the deed was made the appellant built upon the property he holds, and in so doing, he built on his lot, at the north end of the passage-way, a wall to prevent the earth of his lot from falling into the alley, the surface of which was then lower than Huron street, and lower than the surface of the rear of the lot; and also so occupied his lot by building that no wagon could go upon the lot and turn. This, it is insisted, was a practical construction by the appellant of the covenant, and also an abandonment of the easement, further than as a foot-way.

But the convenience of a wagon-way to Huron street, while not as great when the wagon must back in, is not thereby wholly lost. It may be a valuable incident to the lot that goods can be received and delivered in that way, and the appellant is entitled to whatever appurtenances belong to his lot, regardless of the mode in which he will use it.

Second. That the opinion is wrong in not considering

that the reservation of the right of arching the alley was also a reservation of a right to support the arch on the eight and three-quarters feet.

The arch was the grantor's own affair. How he should support it was no more the concern of the appellant than of what material it should be built.

All the interest that the appellant had in the arch was that the width and height of the way should not be diminished to such an extent as to seriously embarrass the use of the alley by wagons.

If a support of an arch can be so placed in the eight and three-quarters feet as not to have that effect, such support would not be a breach of the covenant.

The petition is denied.

Chicago City Railway Co. v. Joseph E. McMeen.

1. **EVIDENCE**—*In Rebuttal Must Deny or Explain Evidence in Chief.*—The testimony of a physician, called on behalf of the defendant, who states that at the solicitation of defendant he made an examination to ascertain the injuries sustained by a plaintiff suing for personal injuries, is not denied or explained by and does not lay a foundation for the introduction by the plaintiff of evidence of a conversation between the plaintiff, his attorney and an attorney for the defendant, in which an arrangement was made that the plaintiff would submit to the examination.

2. **SAME**—*Testimony in Rebuttal.*—After the plaintiff has rested his case, and evidence for the defendant has been received, the plaintiff can not regularly put in evidence, except to deny or explain evidence produced by the defendant.

3. **ATTORNEYS**—*Admissions of, Do Not Bind Client.*—What an attorney says is not evidence against his client, unless it be in the nature of a stipulation as to the conduct of the cause, and then it is not his narrative of events, or his opinion as to anybody's rights or disabilities, that binds his client, but it is his agreement as to the conduct of the cause.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS C. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

WM. J. HYNES and LAURENCE A. YOUNG, attorneys for appellant.

GRAHAM H. HARRIS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT. The appellee sued the appellant for injuries received while—as he alleged—he was a passenger on a car of appellant.

The appellant called as a witness Dr. Babcock, who stated that he, at the solicitation of the appellant, made an examination of the person of the appellee, as to the injuries he had sustained, and made a written report thereof to the claim agent of the appellant, and was paid therefor by the appellant.

On this foundation the court admitted in evidence, over the objections and exceptions of the appellant, a conversation between the appellee, his attorney, and an attorney of the appellant, in which an arrangement was made that the appellee would submit to that examination. The testimony of Dr. Babcock was no foundation on which to admit that conversation; nothing said by him was denied or explained, or sought to be, by putting that conversation in evidence. At that stage of the case the appellee could regularly put in further evidence only to deny or explain evidence which the appellant put in after the appellee rested his case. 2 Ph. Ev., Cowen and Hill, 878, side paging.

If Dr. Babcock had never testified, the conversation, if admissible at all, would have been just as admissible as it was after his testimony, which the conversation neither denied nor explained.

A part of that conversation, as narrated by the appellee, was, as quoted in appellee's brief: "Judge Grinnell said that they considered that they were liable for it and would settle it."

This was error, not on the ground that the conversation was in the nature of an offer to compromise, but on the ground that what an attorney says is not evidence against

his client, unless it be in the nature of a stipulation as to the conduct of the cause. 1 Green. Ev., Sec. 186.

Then it is not his narrative of events, or his opinion as to anybody's rights or liabilities that binds his client, but it is his agreement as to the conduct of the cause that binds.

There are many other questions in the case which will not be considered, as this error is fatal to the present judgment.

The judgment is reversed and the cause remanded.

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Wheeler & Wilson Manufacturing Co. v. Margaret Barrett.

1. EVIDENCE—*Order of Introduction of.*—It is proper to refuse to allow a party to introduce evidence during the cross-examination of a witness for the adverse party.

2. CONTRACTS—*Execution of—Identification of Parties.*—At the conclusion of negotiations for the sale of a sewing machine the purchaser authorized her daughter to execute a written instrument in regard to the machine. In a suit regarding the machine the vendor produced a paper purporting to be signed by the husband of the vendee, claiming that it was the paper signed by her daughter by her direction. *Held*, that the paper could not be regarded as the contract of the vendee.

3. DAMAGES—*\$1,500 Excessive, for Taking Property Worth \$60.*—In the case of an unwarranted bringing of an action of replevin, and a seizure thereunder of a sewing machine which originally cost \$60, and had been in use nearly three years, followed by a voluntary dismissal of the replevin suit, an award of \$1,500 damages is excessive.

4. ESTOPPEL—*By Words or Conduct.*—When one by his words or conduct willfully causes another to believe the existence of a state of things, and induces him to act on the belief so as to alter his previous position, the former is precluded from averring against the latter a different state of things as existing at the same time.

Trespass on the Case, for a wrongful taking of property under a writ of replevin. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed if remittitur be entered, otherwise reversed and remanded. Opinion filed April 15, 1897. Rehearing denied. Opinion filed May 20, 1897.

STATEMENT OF THE CASE.

This was an action of trespass on the case brought by appellee against the appellant. The declaration consists of

one count, which alleges that the plaintiff was the lawful owner and possessed of one Wheeler & Wilson sewing machine number 13,689, of the value of \$75; that the defendant wrongfully, willfully and maliciously, and without any reasonable or probable cause, instituted a replevin suit against the plaintiff, and under and by virtue of the writ issued therein, took said machine from the plaintiff, and afterward on its own motion, dismissed said suit. The defendant pleaded the general issue. On the trial a verdict for \$1,500 was rendered in favor of the plaintiff, and judgment was entered thereon.

It appears from the evidence of the plaintiff, that on the first day of June, 1888, one Gleason, the defendant's agent, took a new Wheeler & Wilson sewing machine to the plaintiff's house, and negotiated with her, in the presence of her daughter and Mrs. Seaman, for the sale of the machine, and the acceptance from the plaintiff, at a valuation of \$12.50, of two old machines in part payment for the new machine. At the conclusion of the negotiations the plaintiff authorized her daughter to execute a written instrument in regard to the machine which she bought.

D. F. FLANNERY, attorney for appellant.

GEO. E. SWARTZ, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Upon the trial of this cause in the court below, the defendant, during the cross-examination of the plaintiff, produced a paper purporting to be signed by Michael Barrett, concerning which the plaintiff testified as before set forth. The defendant then moved to exclude all the evidence given by the plaintiffs as to what took place when the negotiations for the sale of the machine were had.

The court properly refused to sustain such motion. The testimony was that she, not Michael Barrett, bought the machine, and that a paper was signed by her daughter, by

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her direction, relative to the machine she bought; not that the contract of sale or that any contract was signed.

The defendant then offered the paper in evidence. The court properly declined to admit it, as at that time the cross-examination of the plaintiff was going on. Thompson on Trials, Sec. 434; Queen's Case, 2 Brod. & Bing., p. 288, 6 E. C. L. 149.

The paper so offered is as follows :

“WHEELER & WILSON MANUFACTURING Co.

185 and 187 Wabash Ave., Chicago.

\$60.

June 1st, 1888.

Received of the Wheeler & Wilson Manufacturing Company, one Wheeler & Wilson sewing machine, style No. 9, D. A. A., Plate No. 13,689, with its parts, as follows: 1 hemmer, 1 doz. needles, 1 quilting gauge, 1 tuck gauge, 1 ordinary glass, 1 tucking glass, 1 corder glass, 1 braider glass, 4 bobbins, 1 needle wrench, 1 emery wheel, 1 black wrench, 1 oil can, 1 screw driver, 1 thumb screw, 1 throat plate.

To be returned to them on demand, and until such demand I agree to pay them, for the use thereof, ten dollars in hand, and five dollars per month while I keep the same; payable at the office of the Wheeler & Wilson Mfg. Co., 185 and 187 Wabash Ave., Chicago, Illinois, on the same day of each month following the above date, and agree to take good care of the same while in my custody, and not to remove it from my residence, No. 303 S. Halsted street, without their written consent first had and obtained.

No one is authorized to make any contract or verbal promise differing from that written and printed on the face of this lease.

MICHAEL BARRETT.

Read the above and below before signing.

Any promise or agreement made by any one different from that written or printed in this lease will not be recognized.

WHEELER & WILSON MFG. Co.

Witness, M. J. GLEASON.”

On the back of which were the following indorsements:

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June 7, 1888, first payment O. M. \$10; September 4, 1888, \$5; October 3, 1888, \$3; February 20, 1889, \$3; March 27, 1889, \$2; April 23, 1889, \$2.50; May 20, 1889, \$2; August 14, 1889, \$2; September 18, 1889, \$2; February 4, 1890, \$2; March 12, 1890, \$1.50; April 24, 1890, \$2; June 5, 1890, \$2; August 7, 1890, \$3; October 2, 1890, \$2; November 22, 1890, \$1; April 21, 1891, \$1.

The defendant did not again offer this paper, and no other evidence was offered by the defendant; as a consequence, neither this paper nor any evidence on the part of the defendant was given to the jury.

As the case, when submitted, stood, it appeared that the defendant had sold to the plaintiff a sewing machine; after it had been fully paid, it had instituted an action of replevin, taken the machine from the plaintiff, and then dismissed its suit without an attempt to sustain the same. The plaintiff was entitled to recover.

The damages awarded are excessive. It is a case, merely, of an unwarranted bringing of an action for replevin, a seizure thereunder of a sewing machine which originally cost \$60, and had been in use nearly three years; followed by a voluntary dismissal of the replevin suit, a proceeding which Sec. 26 of Chapter 119, entitled "Replevin," seems to encourage. It is not a case of a seizure without process of law, as was the case of *Singer Co. v. Holdfoot*, 86 Ill. 455.

We think that \$300 is as much as ought to be allowed in a case of this kind. If appellee remits to that sum within ten days, judgment will be affirmed for that amount; otherwise the judgment of the Circuit Court will be reversed and the cause remanded. In either case, at the cost of the appellee.

MR. JUSTICE WATERMAN UPON PETITION FOR REHEARING.

Appellant, in the petition for rehearing by it filed, says that this court holds that the written contract was the contract of Michael Barrett, and therefore did not preclude oral testimony by appellee.

This is a misapprehension. We are not of the opinion that a written contract was made by Michael Barrett, or by any one else. It is true that the name of Michael Barrett was signed by the direction of appellee to an instrument that, if signed by him, would have been his contract; but as there is neither evidence nor pretense that Michael Barrett either signed the instrument or authorized any one to affix his name thereto, or has in any way made himself a party to the same, it certainly is not his contract. Neither was it a written contract by appellee.

The rule of law is clear that where one by his words or conduct, willfully causes another to believe the existence of a state of things, and induces him to act on the belief so as to alter his own previous position, the former is precluded from averring against the latter a different state of things as existing at the same time. *Pickard v. Sears*, 6 Adolphus & Ellis, 469; *Hefner v. Van Dolah*, 57 Ill. 520.

In the present case appellee did nothing to induce appellant to believe the existence of a state of things different from the real facts. She did not pretend that she had any authority to sign the name of Michael Barrett to a contract, or to authorize any one else to make such signature, or in any way or wise to make him a party to the alleged contract. She in no way deceived appellant; it knew that the name of Michael Barrett was not that of appellee or her daughter, and must have understood, when it took this instrument so signed, that it had no written contract whatever, for it was in no way deceived. The question is not whether this paper memorandum might have been used for the purpose of ascertaining what the real contract between appellee and appellant was, but whether it is itself a written contract between them, so that all oral testimony as to what was said prior to the signing of such instrument is to be excluded. Appellant attempted to make use of it for such purpose, and not as an adjunct to the oral testimony to determine what the real agreement was. That it is not a written contract between appellant and appellee was apparent so soon as it was presented to the court below; it did

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not purport to be a contract by appellee. There was no pretense that appellant thought that the named signed thereto was that of appellee, or that appellee as an agent of Michael Barrett had a right to make a contract for him, and to sign his name to the instrument in question.

If appellee had in any way deceived appellant, a different question would be presented.

The petition for rehearing is denied.

Henry W. Christian v. Tyler & Hippach.

1. **JOINT LIABILITY—Of Husband and Wife—When Proof of, is Unnecessary.**—In an action against a husband and wife for the value of certain goods, the jury were instructed that it is not necessary for the plaintiff to show that the defendants are jointly liable, and if they believe from the evidence that either of the defendants are liable, they will find for the plaintiffs. *Held*, that the instruction stated the law correctly.

2. **DISMISSALS—After Verdict.**—It is proper to allow the dismissal of a suit as to one of several defendants even after verdict, where there is no evidence against such defendant.

Transcript, from a justice of the peace. Appeal from the County Court of Cook County; the Hon. WALES W. WOOD, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

E. G. LANCASTER, attorney for appellant.

GILBERT & GILBERT, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellees recovered a judgment before a justice against the appellant and his wife. They appealed.

On the trial in the County Court the appellees proved a sale of goods, on the order of the appellant alone, and the defendants (appellant and his wife) demurred to the evidence, which demurrer the court overruled and instructed the jury as follows:

"The jury are instructed, as law in this case, that it is not necessary for the plaintiff to show that the defendants are jointly liable in the above cause, and if they believe from the evidence that either of the defendants are liable, then they will find for the plaintiffs and assess their damages at the amount they believe from the evidence is due them."

That instruction is in accordance with the law held here in *Touhy v. Daly*, 27 Ill. App. 459.

After verdict for the appellees against both defendants, the appellees discontinued as to the wife, and took judgment against the appellant alone. The appellant can not now complain that injustice was thereby done to him, as his position here is, as it was in the County Court, that there was no evidence to charge her. The practice that such discontinuances may be entered is settled. *Chambers v. Beahan*, 57 Ill. App. 285.

A motion to apportion the costs was denied, but that any additional costs accrued by reason that she was joined in the suit does not appear.

There is little to induce a very anxious review of this judgment of \$38 for a just debt, and it is affirmed.

Hans A. Calland and John F. Pethybridge v. Louis A. Trapet.

1. *CUSTOM AND USAGE—Proper Office of—Must be Generally Known.*
—The proper office of a custom or usage in business is to ascertain and explain the intent of the parties, and it can not be inconsistent with the terms of the agreement between them, or against the established principles of law. It must be generally known, and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it.

2. *SAME—Requisites of.*—Where usage is relied upon to establish a right it must be shown to be ancient, certain, uniform, reasonable, and so general as to furnish a presumption of knowledge by both parties.

Assumpsit, for commissions. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard

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in this court at the March term, 1897. Affirmed if remittitur be entered, otherwise reversed and remanded. Opinion filed May 24, 1897.

JONES & STRONG, and FRANK CROSBY, attorneys for appellants.

ST. JOHN & MERRIAM, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit, to recover from appellants real estate commissions claimed to be due from them on account of an exchange, said to have been effected by appellee, of certain real property in Evanston for real and personal property in Clinton, Iowa.

There is no dispute that the exchange was effected. That appellee was employed to make the same is denied.

It appears that appellants, when proposing to trade their property for other real property, put their property in for consideration at a valuation of \$75,000. That they at first declined to accept the Clinton property because there was a mortgage of \$10,000 upon it, and afterward concluded to exchange, first putting an incumbrance of \$10,000 upon their Evanston property, so that the mortgages upon the respective properties might be equal.

The Clinton, Iowa, property had also, in being placed upon the market for exchange, been put in at a valuation of \$75,000.

It is evident that neither of the trading parties thought their respective properties to be worth anything like the amount that, for trading purposes, they had placed its value at; so that when deeds came to be drawn, the consideration in the conveyances made of the Evanston property was placed at \$30,000, while the consideration for the Clinton, Iowa, property was placed at \$37,500, because that property included not only real estate but certain personal property consisting of horses, furniture, etc.; and thus while, by the considerations recited in the deeds, one prop-

erty appears to have been sold for \$7,500 more than the other, the exchange was even.

It appears that neither property was actually worth over \$15,000; that one of the owners of the Evanston property had, prior to the trade, offered to sell his one-half interest for \$7,000. That a deed for appellants to execute was first made out with the consideration of \$75,000 written in it, and that they refused to execute such deed.

Appellee claimed that he was entitled to a commission of two and one-half per cent upon \$75,000, being the sum of \$1,875, with interest thereon at five per cent per annum.

It was not claimed that there had been any agreement as to what commission should be paid; while appellants insisted that appellee was acting for the owners of the Clinton, Iowa, property, and that they distinctly told appellee that they would not pay any commission.

As to the commissions to which appellee claimed he was entitled, appellee testified as follows:

“Have been in the real estate business in Chicago since 1887, and know the general custom and usage among owners and brokers in Chicago as to brokers’ commissions. According to the Real Estate Board rules, under which we work, commissions for anything under \$3,000 in Cook county is five per cent for clear property, and above that to \$10,000 is two and one-half per cent; outside of Cook county five per cent. This would fall under the two and one-half per cent class. These were the rules governing transactions at that time. I base this two and one-half per cent commission on the original proposition on which the deal was made—\$75,000. It is ordinarily based on the proposition that is made and accepted; it makes no difference about the value of the property. It may be based on \$100,000 and closed on the basis of \$10,000; that would not determine the value. I charge on the value the owner puts on. The owner fixes what he thinks his property worth; he makes a proposition and we base on that. It depends very little on the value. A good deal depends on supply and demand.”

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Another witness for plaintiff testified: "Was familiar with the customs pertaining to exchanges of real estate here in the city in 1894. Commissions on sales of property of this description in Cook county were by that custom two and one-half per cent on the price. By price I mean the price the property is sold at. This price has nothing at all to do with the value of the property. The price is given to you by the owner of the property in utter disregard of its value."

A witness for defendants testified that the custom of real estate agents in Chicago, as to charging commissions, is not to charge on the consideration mentioned in the deed, but on the value of the property.

There is no evidence in the case upon which to base a rate for commissions save testimony as to usage in Chicago at the time the exchange under consideration was made.

The Supreme Court in *Bissell v. Ryan*, 23 Ill. 517, said: "The proper office of a custom or usage in business is to ascertain and explain the intent of the parties; and it can not be in opposition to any principle of general policy, nor inconsistent with the terms of the agreement between the parties, or against the established principles of law. Besides all, it must be generally known and established, and so well settled and so uniformly acted upon as to raise a fair presumption that it was known to both contracting parties, and that they contracted in reference to it, and in conformity with it. * * * All the authorities concur in saying that, if usage is relied upon, it must be shown to be ancient, certain, uniform, reasonable, and so general as to furnish this presumption of knowledge by both parties." See also *Turner v. Dawson & Howe*, 50 Ill. 85.

This language of the court is repeated and affirmed in *Wilson v. Bauman et al.*, 80 Ill. 493, and in *Sweet v. Leach*, 6 Ill. App. 212. The same doctrine is announced in *Converse v. Harzfeldt*, 11 Ill. App. 173; *Mulliner v. Bronson*, 14 Ill. App. 355; *Leggat et al. v. Sands Brewing Co.*, 60 Ill. 158, and in *Coffman v. Campbell & Co.*, 87 Ill. 98.

The Supreme Court in *Bissell v. Ryan*, also say that "a

usage can not be established by proof of one instance, but by an accumulation of instances; that it can not be established by evidence of opinion merely." *Cunningham v. Fonblanque*, 6 C. & P. 44.

In 27 Am. & Eng. Ency. of Law, 736, 737, the doctrine as to usages is declared to be as follows:

"Usages being a fact, and to be proved as a fact, it follows that the existence of a usage can not be established by the mere opinions of witnesses as to what is, as applied to the law, the case in hand. It often appears that what is supposed to be a usage of trade, is merely the general opinion of persons as to their rights and liabilities under certain facts; such opinion can not constitute a usage. Merchants may consider themselves as having certain rights in certain cases, and may think of the matter as being a usage of their trade; but a usage is a mode of conducting business, a course of dealing, and can not from its nature be the subject of opinion. It must be a method of dealing with certain facts, and not a conclusion as to the rules of law pertaining to those facts."

It is apparent that the testimony as to usage did not come within the rule of law in respect thereto. Appellee, who did not claim to be a member of the Real Estate Board, testified as to its rules, under which, he said, "we work."

This is very far from being a statement of a generally known, established, and so well settled custom that therefrom the presumption is raised that both parties contracted with reference to it.

None of the witnesses testified to any established, well settled, certain and general custom about charging commissions upon the basis of the price put upon the property by the owner, without respect to what might be obtained for it, although appellee testified that he charged on the value that the owner puts on his property, and appellee's witness, R. B. Stone, testified that commissions were charged upon the price the property is sold at, which he declared had nothing to do with the value of the property.

In the present case it does not appear that the Evanston

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property was in reality sold at any particular price; it was exchanged for another piece of property; so that if we are to ascertain and express in dollars the price for which the Evanston property was sold, we have to ascertain the value in dollars of the Clinton property, which does not appear to have been worth more than \$15,000.

The jury returned a verdict for \$937.50, which is 2½ per cent upon \$37,500, the sum named in the deed of the Clinton property as the consideration.

There was no evidence either of a general, well understood and certain custom in the sale of real estate to charge commission on the consideration named in the deed, or on the price which the owner may have fixed upon his property, without reference to the value actually obtained therefor. Whatever custom exists in this regard should have been proven, in accordance with the rule as laid down by the Supreme Court of this State.

For the want of such evidence, the judgment of the Circuit Court will be reversed and the cause remanded, unless appellee shall, within ten days, remit to the sum of \$375.00, in which case the judgment will be affirmed for that amount, in either case at the costs of appellee.

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Wallace C. Clark v. W. H. Parker et al.

1. **CONTEMPT OF COURT—Classes of—Civil Contempts Defined.**—The main division of acts of contempt is into those which are criminal and those which are civil. A civil contempt is a failure or refusal of a party to do something which the court has ordered to be done by him for the benefit or advantage of another party to the cause. The order in such case is not punitive but coercive.

2. **SAME—Length of Commitments for Civil Contempts.**—An imprisonment for a contempt of an order in a civil proceeding where the process is for the benefit of the adverse party, should terminate upon the compliance by the contemner with the requirements of the order. A court has no power to order a commitment for a definite time in such a case.

Assignment Proceeding.—Order of commitment for contempt of court. Appeal from the County Court of Cook County; the Hon. CHARLES H. DONNELLY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

WILBUR N. HORNER, attorney for appellant.

No appearance for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

For failure to comply with an order of court previously entered requiring the appellant to pay to the appellees certain money claims ascertained to be due by him to them, out of funds found to be in his hands as assignee of the Southern Hotel Company, the appellant was adjudged to be in contempt, and it was thereupon ordered that "he be and he is hereby committed to the county jail of Cook county for a term of thirty days for his willful failure and refusal to comply with the said order of this court," and that a mittimus issue, etc.

This appeal is from such order.

It will be observed that the order of commitment is for a definite term, irrespective of whether the contemner complies with the violated order or not. There is no authority for such a commitment in a case of this character. The main division or classification of acts of contempt is into those which are criminal and those which are civil.

This case belongs to the latter class, which consists in the refusal of the party to do something which the court has ordered to be done by him for the benefit or advantage of another party to the cause; in which case he may stand committed until he complies with the order. The order in such case is not punitive, but coercive. Rapalje on Contempts, Sec. 21; Phillips v. Welch, 11 Nev. 187; In re Chiles, 22 Wall. 157, 168; Stimpson v. Putnam, 41 Vt. 238, 249.

Blackstone, Book IV, Chap. 20, under the head of "Summary Convictions," in enumerating the different species of contempts, mentions:

“6. Those committed by parties to any suit or proceeding before the court: as, by disobedience to any rule or order made in the progress of any cause; by non-payment of costs awarded by the court upon a motion; or by a non-observance of awards duly made by arbitrators or umpires, after having entered into a rule for submitting to such determination. Indeed the attachment for most of this species of contempts, and especially for non-payment of costs, and non-performance of awards, is to be looked upon rather as a civil execution for the benefit of the injured party, though carried on in the shade of a criminal process for a contempt of the authority of the court.”

It follows logically that if the process be for the benefit of the adverse party, the moment he become satisfied the imprisonment should terminate, and should terminate by force of the fact of satisfaction.

The commitment should not have been for thirty days absolutely, which is appropriate only when the order is intended to be and is rightfully for a punishment.

But the contempt consisting, not in doing a forbidden act, for which the process was intended to be and might rightfully be punitive in character, but, being purely civil, to compel restitution or performance to the party injured, the commitment should in terms have been for a time no longer than until he should perform the act required of him.

The precedents in cases of commitment for a civil contempt, wherever we have been able to see them, provide for the commitment being in terms either until the contemner performs, or for a definite time or until he performs. See authorities above cited, and also *Ex parte Smith*, 117 Ill. 63, 64; *People v. Pirfenbrink*, 96 Ill. 68, 70; *Beach on Modern Eq. Pr.* 1334-5; *Rapalje on Contempts*, 240, 245, 251, 252.

The argument of appellant, that he is not guilty of contempt, has not satisfied us; but the order committing the appellant to jail for thirty days absolutely is reversed, and the cause remanded.

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Henrietta Andrews v. Max Donnerstag et al.

1. **FRAUDULENT CONVEYANCES**—*May be Set Aside in Equity*.—It has long been settled, in this State, that it is the proper province of a court of equity to remove fraudulent conveyances that stand in the way of the collection at law of money judgments.

2. **SAME**—*Exhaustion of Legal Remedy Not Necessary to Attack Upon in Equity*.—When the scope and effect of a bill is simply to set aside and remove out of the way of the complainant's execution upon a judgment at law, certain conveyances executed by the judgment debtor, without any valuable consideration, after he became debtor to the complainant, it is not necessary to allege and prove the exhaustion of his legal remedy, but the creditor may file his bill as soon as he recovers judgment.

3. **SAME**—*Attacks Upon, in Equity*.—The fact that land fraudulently conveyed could have been levied on and sold without first attacking the fraudulent conveyance does not bar the remedy in equity to have the conveyance set aside.

4. **SAME**—*Sale of Land after Removal of Fraudulent Conveyance Proper under Prayer for General Relief*.—Where a fraudulent conveyance has been set aside, a decree directing the sale of the property is proper under the prayer for general relief.

5. **DECREES**—*When Finding of Facts Recited in, is Conclusive*.—In the absence of a bill of exceptions, a court of appeal is concluded by the finding of facts recited by a decree.

Bill, to set aside a fraudulent conveyance. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

MOSES SALOMON, attorney for appellant.

BULKLEY, GRAY & MORE, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The bill in this case was filed by the appellees in aid of an execution issued upon a judgment at law recovered by them against one Henrietta Diamond for \$1,395.10, and levied upon certain real estate which it was alleged was, prior to the rendition of said judgment, but subsequent to

the incurring of the indebtedness upon which the judgment was recovered, fraudulently conveyed by the said Diamond to the appellant for the purpose of defrauding the creditors of said Diamond, and of putting the same beyond the reach of a levy and sale under said execution, and the prayer was, *inter alia*, that said conveyance might be set aside, and that the premises be sold to satisfy the said judgment. Answers were filed by all the defendants to the bill, denying all fraud, etc., and averring good faith in the attacked transaction.

The decree appealed from, found that the said conveyance to the appellant was a sham, was made by said Diamond without any consideration, and was made with the fraudulent intention alleged, and that appellant took the conveyance with knowledge of such fraudulent intention; and adjudged that the same be set aside and vacated and declared to be null and void, and of no effect as against the appellees, and ordered that appellees be authorized to proceed under the said levy to cause said real estate to be sold by the sheriff to satisfy said judgment, etc.

No certificate of evidence is made to appear in the record before us, and the only question raised by appellant's brief is that the bill upon its face is insufficient to support the decree, and is without equity.

It has long been settled in this State that it is the proper province of a court of equity to remove fraudulent conveyances that stand in the way of the collection at law of money judgments. *Farnsworth v. Strasler*, 12 Ill. 482.

The bill was not a pure creditor's bill, filed for the purpose of reaching equitable assets and subjecting them to the payment of the judgment, to sustain which it would be necessary to allege and prove an exhaustion of legal remedies by a return of execution unsatisfied before the filing of the bill.

But, as said in *Wisconsin Granite Company v. Gerrity*, 144 Ill. 77: "Its real scope and effect is simply to set aside, and remove out of the way of complainant's execution upon its judgment at law, certain conveyances executed by the defendant after he became debtor to the complainant,

without any valuable consideration and purely voluntary, and therefore fraudulent in law as against the rights of the complainant, to sustain which it was unnecessary to allege and prove the exhausting of its legal remedy before the filing of its bill, but it was authorized to file its bill as soon as it had recovered its judgment."

In the case just quoted from, as in this case, it was contended that there was other property belonging to the judgment debtor out of which the execution might have been made. In that case it was attempted to make such fact appear in evidence, and in this case it is said that it so appears on the face of appellees' bill. We do not so understand the bill to show, but if it does, the decree finds that the judgment debtor "has no other property, real or personal, out of which the execution" could be made; and in absence of a certificate of evidence, we are concluded by such finding.

It may be, as argued, that appellees might have ignored the conveyance, and proceeded to sell the fraudulently conveyed real estate without first obtaining a setting aside of the conveyance, but they were not bound to do so. They had the right to elect to pursue the course marked out in their bill here. *Quinn v. The People*, 45 Ill. App. 547.

If we correctly understand the point made by the appellant, that the decree gave relief not specifically prayed for, to mean that because the specific prayer was that the conveyance to appellant be set aside, it was error to authorize appellees and the sheriff to proceed to sell the premises under the levy made, we may say that the prayer asked also for such other relief as might appear to be equitable. It may perhaps be said that such additional relief was quite unnecessary; for the right to proceed to sell would follow a setting aside of the conveyance; but if it were necessary, then we think it was properly ordered under the prayer for general relief.

A careful consideration of the entire record before us, and of appellant's several contentions, has satisfied us that the bill presented a sufficient and equitable case for the relief decreed, and the decree is therefore affirmed.

West Chicago Street R. R. Co. v. Louisa Manning.

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1. **NEGLIGENCE—Starting Street Cars Suddenly as Passengers Are Getting Off.**—In a suit for personal injuries against a street car company, it was shown that at the time the plaintiff attempted to alight other passengers did get off, and that the conductor must, if he exercised reasonable diligence, have seen them so alighting. *Held*, that to suddenly start the car under such circumstances, and thereby cause an alighting passenger to be thrown, was evidence tending to show a negligent operation of the car, and a proper matter for the consideration of the jury.

2. **STREET RAILROADS—Duty in Discharging Passengers.**—An instruction defining the duties of employes of a street railroad company in stopping its cars to allow passengers to alight, given in the opinion, held proper.

3. **SAME—Proper Places to Alight—Presumption of Knowledge of Passengers as to.**—It is not the law that passengers on a street railroad are presumed to know that the proper places for passengers to alight are at the further crossings of street intersections.

4. **SAME—Care Required of Passengers.**—A passenger of a street railroad situated in a place of peril is not required to exercise the highest degree of vigilance for his own safety. The conduct required of a passenger under circumstances of danger is only that which an ordinarily prudent person would exercise under the same circumstances.

5. **SAME—Proof of Payment of Fare in Suits for Personal Injuries.**—In a suit by a passenger against a street railroad company, an allegation in the declaration that the plaintiff paid his fare is surplusage; and an instruction that unless the plaintiff proved, by a preponderance of the evidence, that he had paid his fare, as alleged in his declaration, the verdict should be for the defendant, does not state the law correctly.

6. **WORDS AND PHRASES—"At."**—"At," when used in describing the place where an event occurred, means a relation of proximity to or nearness to, and a failure to prove the exact spot alleged does not constitute a variance.

7. **INSTRUCTIONS—Right to, Limited.**—Where counsel ask for a confusing and unreasonable number of instructions in a case that is controlled by a comparatively few well settled principles, a court of appeal may reasonably decline to critically examine refused instructions to determine if they do not contain an additional legal principle applicable to some phase of the case not covered by those given.

8. **ERROR—Without Injury, Not Ground for Reversal.**—A court of appeal will not reverse a judgment because a jury neglected to follow an erroneous instruction given at the instance of the party making the complaint, as no legal wrong was thereby done to such party.

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West Chicago St. R. R. Co. v. Manning.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

ALEXANDER SULLIVAN, attorney for appellant; E. J. McARDLE, of counsel.

HENRY D. BEAM and WILLIAM R. RUMMLER, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit to recover for personal injuries alleged to have been sustained by the appellee by being thrown to the ground when she was in the act of alighting from one of appellant's cars upon which she was a passenger, by the sudden and negligent starting of the cable train, composed, in part, of said car, after it had come to a stop at the corner of Washington street and Fifth avenue, in the city of Chicago.

The verdict was for \$5,000, from which \$1,500 was remitted and judgment was entered for the balance.

There is no point made in argument that the judgment is for too much, if, under the law and the evidence, any recovery can be sustained.

The facts are few and simple. The train had come eastward from the West Side of the city, through the Washington street tunnel, and the accident happened at or just before the beginning of the curve in the railroad from Washington street southward into Fifth avenue.

The contention of the appellee is that the train stopped in Washington street, at or near its intersection with Fifth avenue, and such intersection being the place where she and her companion wished to get off she, following her companion who stepped off in safety, rose from her seat while the train was at a stand-still and stepped down upon the foot-board of the car in the act of stepping to the ground, when the train, without warning to her, was suddenly started up, causing her to fall to the ground, and occasioning the injuries alleged to have been suffered by her.

She does not claim to have given any signal or word of

her wish to get off at that point, except such as was implied by her act of rising from her seat and stepping down in the manner stated.

On the other hand, the appellant contends that the train had not stopped, but had only slackened speed because of a team that was in the way ahead; that the regular stopping place was at the further end of the curve, and that for appellee to attempt to get off under the circumstances was such negligence on her part as to bar her from a right to recover.

A candid consideration of all the evidence as to whether the train stopped or only slackened up, justifies, in our opinion, the correctness of the jury's conclusion that it had come to a full stop before the appellee attempted to get off, and that it was suddenly started up again before she had reasonably sufficient time to safely alight.

Whether the near or the far side of a street crossing be the appropriate or the customary and lawful place for street cars to stop to take on and let off passengers is not a subject for consideration upon this record. It was proved, and not denied, that when the stop in question was made other passengers besides the appellee and her companion did get off, and there was evidence that tended to show the conductor must, if he exercised reasonable diligence, have seen them so alighting. To suddenly start up the train under such circumstances and thereby cause an alighting passenger to be thrown was, at the very least, evidence tending to show a negligent operation of the train, and was a proper matter for the consideration of a jury, and their finding under all the evidence in the case ought not to be disturbed. See *C. C. Ry. Co. v. Mumford*, 97 Ill. 560.

"Having by the acts and conduct of his servants justified the plaintiff in attempting to get off the train, the duty of the defendant then attached to stop his train a sufficient length of time to enable the plaintiff to reach the platform in safety," and such duty was in respect to the place where the train first halted, and not in respect of the place (further crossing) where it finally stopped. *McNulta, Receiver, etc. v. Ensich*, 134 Ill. 46.

It is contended that there was a variance between the declaration and the proof, because the declaration averred that the car was "stopped at the corner of Washington street and Fifth avenue," while the proof showed that it was stopped, if at all, west of the corner.

All of the testimony on both sides showed that the stopping or slackening up, whichever it was, occurred near to if not exactly at the line of intersection of such streets.

The wagon that caused the train to stop was "passing along Fifth avenue," and the appellee fell within the lines of Washington street, and at the moment she fell the grip-car, which was next in front of the car she was riding in, was upon the curve, and partly or wholly within the lines of Fifth avenue.

The allegation could scarcely have been more definite. "At," in the sense used in the declaration, means a relation of proximity to, nearness, near, about. Century Dictionary; Webster's Dictionary.

The proof sufficiently fits the allegation, and there was no variance.

Some other minor criticisms of the declaration, as compared with the evidence, are made, but they are unimportant.

At the instance of the appellee the court gave to the jury the following instruction, which is much complained of by the appellant:

"The court instructs the jury, as a matter of law, that it was the duty of the defendant, as a common carrier of persons of Chicago, when it stopped its cars, whether in consequence of a signal from some passenger on the car or not, not to start the same again while its passengers, or any of them, were in the act of getting off the car, if the fact that its passengers or any of them were in the act of alighting was known to the person having charge of said car, or would be known to such person by the exercise of due care and caution in the discharge of his duties; and as a common carrier of passengers the defendant should give its passengers a reasonable opportunity to alight from its cars

when standing still before starting the same—if the fact that its passengers or any of them desire to alight is known, or by the exercise of due care and diligence would be known, to the person in charge of the car.

And if the jury believe from the evidence in this case that on the twenty-second day of September, 1893, the plaintiff was a passenger upon one of the street cars of the defendant, operated by it on Washington street and Fifth avenue in said city of Chicago, and that while such car of the defendant, in which the plaintiff and others were being conveyed as passengers, was driven along Washington street, west of and toward Fifth avenue, it was stopped for the purpose of allowing its passengers, or some of them, among whom was the plaintiff, to get off; or had stopped for any other purpose, with or without a signal to stop, and when so stopped its passengers or some of them were in the act of getting off said car; and that the gripman or other person in charge of said car for the defendant knew, or by the exercise of due care and caution in the discharge of his duties would have known, that said passengers were in the act of getting off said car.

And if you further find from the evidence that the plaintiff, at this time and place, the said car being stopped and not in motion (if you find from the evidence that such was the fact), in the exercise of due care and diligence on her part was also in the act of alighting from said car, and that the defendant, by its gripman, started the said car while the plaintiff was so getting off, and before she had a reasonable time to do so, and thereby threw the plaintiff down upon the street, and by reason thereof the plaintiff was greatly injured in and about her hips, and was thereby otherwise greatly bruised and suffered severe bodily pain and injury, without negligence or fault on her part, and by reason of negligence or carelessness on the part of the defendant's servants in charge of said car (if you find from the evidence that such servants of the defendant were guilty of carelessness or negligence in starting said car), then the defendant would be liable for the damages, if any, thereby sustained by

the plaintiff, and the jury should find the issues herein for the plaintiff and assess her damages at such sum as the jury shall find from the evidence she has thereby sustained."

We have given attention to the several objections urged against such instruction, and deeming it unnecessary to lengthen the opinion by stating what they are, we are of opinion that the instruction is substantially correct, although unnecessarily verbose.

The appellant offered to the court and requested the giving of twenty-six instructions, of which eighteen were given in their original form, and one was given as modified. Of the seven that were refused, complaint is made concerning only two.

Where counsel thrust such a mass of law into a case that is controlled by a comparatively few well settled principles, we might reasonably decline to critically examine a refused instruction, to determine if it does not contain an additional legal principle applicable to some phase of the case not covered by the given instructions. *Fisher v. Stevens*, 16 Ill. 399; *Leiter v. Kinnare*, 68 Ill. App. 558.

But in this case the labor is easy. It is not the law that passengers on the road in question "are presumed to know that the proper places for passengers to alight are at the further crossings of street intersections," etc., as stated in one of the refused instructions.

Nor is it the law that a passenger situated in a place of peril "must exercise the highest degree of vigilance and care for her own safety," as stated in the other refused instruction. The conduct required of a passenger under circumstances of danger needs only to be that of an ordinarily prudent person. *West Chicago St. R. R. Co. v. McNulty*, 64 Ill. App. 549; same case, 166 Ill. 203.

It is also urged as a reason for reversing the judgment that the jury disregarded the instructions of the court, and particularly that they disregarded an instruction that unless appellee proved by a preponderance of the evidence that she had paid her fare, as alleged in her declaration, they should find appellant not guilty, there being no evi-

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dence that she paid or that any one for her paid her fare. The allegation by the declaration of payment of fare was surplusage, and the instruction referred to did not state the law and ought not to have been given. C., C., C. & St. L. Ry. Co. v. Best, 68 Ill. App. 532.

We will not reverse a judgment because a jury has neglected to follow an erroneous instruction given at the instance of the party making the complaint, who was not thereby legally wronged, *McNulta v. Ensich*, 134 Ill. 46, where, as here, the relation of carrier and passenger was not disputed, and the obligation to pay fare will be implied from the relationship, if not presumed to have been made. 2 *Redfield on Railways* (6th Ed.), 95. Moreover, the jury did right. *Koerper v. Jung*, 33 Ill. App. 144.

There being no material error in the record, the judgment will be affirmed.

Northwestern Iron & Metal Co. v. The National Bank of Illinois.

1. **NEGOTIABLE INSTRUMENTS—Time Allowed Payee to Present Check.**—Where a payee, to whom a check is delivered by the drawer, receives it in the place where the bank on which it is drawn is located, he may preserve recourse against the drawer, by presenting it for payment at any time before the close of banking hours on the next day, and if in the meantime the bank fails, the loss will be the drawer's, and in this respect there is no difference between a certified and an uncertified check. The fact that the holder of the check has good ground for believing that the bank upon which it is drawn is in a precarious condition and likely to fail, does not create an exception to the rule.

Assumpsit, on a check. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

STATEMENT OF THE CASE.

This was an action at law on a certified check for seven hundred and forty-seven dollars and thirty cents (\$747.30),

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dated June 2, 1893, drawn by the appellant on Messrs. Herman Schaffner & Company, and payable to order of appellee.

This check was given to the appellee by appellant under the following circumstances:

On Friday, June 2, 1893, appellant's book-keeper, Bernstein, having received notice that a Peoria draft, drawn on appellant for \$747.30, was in the hands of appellee for collection, had this check (for the exact amount of the draft) drawn on appellant's account at Schaffner & Company's, and after getting the same certified by said bankers, took the check to appellee's banking house between 2:00 and 2:15 on the afternoon of said June 2d, and delivered the same to appellee in payment of the Peoria draft, which draft, after being stamped "paid" by appellee, was delivered to Bernstein. Bernstein made a deposit of some seven hundred dollars with Schaffner & Co., on behalf of appellant, just before getting the check certified by them, and there was a sufficient amount to the credit of appellant to pay the check.

Schaffner & Co. paid any checks drawn on them that were presented before close of business on said June 2d.

On the morning of Saturday, June 3d, Schaffner & Company made a voluntary assignment for the benefit of creditors. No notice of the non-payment of the check by Schaffner & Company was given appellant until more than a month after its date, and then counsel of appellee wrote appellant a letter calling the matter to its attention, and asking appellant to call and see the writer of the letter about it. Appellant refused to pay the check, and this suit was instituted June 20, 1894.

For some time prior to the date of the transaction in question, appellee had been "clearing" for Schaffner & Company—that is, Schaffner & Company were not members of the Chicago Clearing House, and the appellee had acted in their behalf, paying for Schaffner & Company all checks drawn on them and presented through the clearing house. Schaffner & Company had, during such period, kept

a regular deposit account with appellee, and the custom was for Schaffner & Company each day to give appellee a check drawn on their said account in payment of the aggregate amount of such clearings paid by appellee that day.

It appears that on said June 2, 1893, appellee's officers received notice, as was customary, at about 11 o'clock in the morning, as to returns from the clearing house, appellee's clerks bringing back at that time all the checks which appellee had there paid, including those drawn on Schaffner & Company; that the aggregate amount of checks drawn on Schaffner & Company, so paid by appellee that day, was \$163,504.94; that a clerk of Schaffner & Company came over and got these checks, and Schaffner & Company gave appellee a check drawn on its deposit account for the amount so paid; that the giving of this check overdrew said deposit account of Schaffner & Company at that time—midday or one o'clock—in the amount of some \$150,000 or \$160,000; that Schaffner & Company made deposits to the credit of its said account that afternoon; that said deposits consisted in part of three certain checks drawn by Schaffner & Company, one being for \$240,000, and drawn on Merchants Loan & Trust Company, Chicago; one being for \$30,000 on the same bank, and one being for \$90,000 on the American Exchange Bank, New York City; that appellee's officers knew these checks were not good at the time they took them; that Schaffner & Company were given credit on said June 2d by appellee for the amount of said checks so deposited; that during that afternoon Schaffner & Company also made three other deposits with appellee of the respective amounts of \$2,333.04, \$2,667.11 and \$6,704.15, said deposits consisting in part of cash; and that it appeared from the books of appellee that at the close of business on June 2, 1893, there was a book balance of \$11,127 in favor of Schaffner & Company.

After banking hours on June 2d, appellee received from Schaffner & Company collaterals to secure any claims it might have against them, which, together with those before held, aggregated so that the total security held by appellee

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from Herman Schaffner & Company, at the time the latter failed, was \$269,482.99, upon which, at the time of the trial of this case, appellee had collected \$232,542.39. At the time of their failure, Herman Schaffner & Company owed appellee \$320,006.37 on overdraft.

The amount realized from the securities was credited upon the overdraft, and was not sufficient for that purpose. At the time of the trial, Herman Schaffner & Company were still indebted to appellee.

Appellee on June 3d sent this check over to the clearing house, and it was stamped, "Pay through Chicago Clearing House to National Bank of Illinois."

The appellant contends, *inter alia*, that prior to the close of business on June 2d, appellee had notice that Schaffner & Company were in such financial difficulty as required appellee to present the certified check for payment on that day, and that its failure to do so was a lack of diligence that rendered it liable for the amount for which the check called; that the question of whether appellee was negligent should have been submitted to the jury, and that it was error to instruct the jury to find for the plaintiff.

ALDRICH, REED, FOSTER & ALLEN, attorneys for appellant.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Where a payee, to whom a check is delivered by the drawer, receives it in the place where the bank on which it is drawn is located, he may preserve recourse against the drawer by presenting it for payment at any time before the close of banking hours on the next day, and if in the meantime the bank fails, the loss will be the drawer's; and in this respect there is no distinction between the certified and an uncertified check. *Bickford v. First Nat. Bank*, 42 Ill. 238; *Daniel on Negotiable Instruments*, 4th Ed., Vol. 2, Sec.

1590; Tiedeman on Commercial Paper, Sec. 443; Thompson on Bills of Exchange, p. 119; Story's Bills of Exchange, 4th Ed., Sec. 471; Parsons on Notes and Bills, Vol. 1, p. 466, 477.

This is not disputed by appellant. What it contends is, that to this rule there is an exception, namely: That if the holder of the check has good ground for knowing that the bank upon which it is drawn is in a precarious condition, and likely to fail, he is bound to present the check at once.

The importance of the contention of appellant is manifest, for it in effect is, that the holder of a check can not rely upon the rule that he has during the banking hours of the next day after its reception within which to present the check for payment, but that it is a question of fact to be submitted to a jury, whether, on account of some knowledge or notice that came to him, he was not bound to present the check for payment at once, and by a failure so to do, has lost his recourse against the drawer.

The question is not here presented for the first time. In *Schofield v. Hananer*, 9 Heisk. (Tenn.), 171, the trial court had instructed the jury substantially in accordance with the contention of appellant in the present case. On account of such instruction the judgment of the lower court was reversed, the Supreme Court saying that the drawer of a check issues it with the implied understanding that it need not be presented for payment except within the business hours of the next day after its issuance, and the holder takes it with the same understanding. That during this time, therefore, no *laches* can be imputed to the holder unless he received it with a different contract.

In Story on Bills of Exchange, 4th Ed., Sec. 471, the rule in respect to inland bills of exchange (checks) drawn in a town or city on a drawee in the same town or city, and payable to a third person, or his order on demand, is stated to be that in no case is it indispensable that the payee or other holder lay aside all other business to make a demand of payment on the day on which he receives the bill, any more than it is for the holder to give notice of the dishonor of a

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bill on the day of its dishonor, to the other parties liable. Our attention has been called to no case in which there has been a holding in accordance with the contention of appellant. There is, in *Bank v. Alexander*, 84 N. C. 30, in the opinion of the court, a remark as if the court were of the opinion that if the holder of a check has reasonable ground for thinking the bank upon which it is drawn unsafe, he should present the check for payment at once, but there was no such holding, nor even a declaration of opinion that such is the law.

The remark in *Morse on Banks and Banking*, Vol. 2, 421, has for its support merely the remark made in *Bank v. Alexander*, 84 N. C. 30.

The case of *Finch v. Karste*, 56 N. W. Rep. 123, cited by appellant is that of the obligation of a party to whom the draft was forwarded for collection, in which the party, occupying a fiduciary relation to the plaintiff, proceeded to secure its own claim against the drawee before presenting for payment the draft it held for collection.

There was no evidence tending to show that appellee has received payment of this check from *Schaffner & Company*; on the contrary, it appears that *Schaffner & Company*, at the time of their failure, were indebted to appellee in the sum of about \$100,000 more than the entire value of all appellee has received, and of all the security it holds; nor does it appear that appellant has suffered any loss from the failure of appellee to give notice at once of the non-payment of the check, while notice was given in time to enable appellee to file its claim against the insolvent firm of *Schaffner & Company*.

Appellant, for its own purposes, instead of presenting its check to *Schaffner & Company* for payment, had them certify it, and then gave it to appellee in payment of its, appellant's, obligation. When appellant did this, it knew that appellee had all of the business hours of the next day within which to present such check to *Schaffner & Company* for payment. It did not leave the check with appellee in trust to collect and hold the proceeds thereof for its, appellant's,

Second Nat. Bank v. Gilbert.

use, but left the same in payment of its obligations, knowing that if Schaffner & Company failed before the close of business on the next day, and before said check had been presented for payment, there would have been no payment of its, appellant's, obligation, and that it would be bound to respond to appellee for the amount of the check.

We express no opinion upon the question whether appellee had reasonable ground to apprehend the failure of Schaffner & Company, as we think it important that a decision should be made upon the contention of appellant that the holder of a check must present it for payment at once, or run the risk of having to submit to a jury the question of whether he had not such notice of the financial insecurity of the drawee as charged him with the duty of hastening with all speed to secure payment.

The judgment of the Superior Court is affirmed.

Second National Bank v. James H. Gilbert.

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1. **SHERIFFS—Right to Require an Indemnity Bond.**—A sheriff entitled to an indemnity bond has a right to require one that needs no explanations, and on its face is subject to no objections.

Trespass on the Case, for a false return. Appeal from the Circuit Court of Cook County; the Hon. RICHARD W. CLIFFORD, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

REMY & MANN, attorneys for appellant.

E. R. BLISS, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellant recovered a judgment in the Superior Court of Cook County against Frederick S. Eames for \$2,450 and costs, upon which it sued out execution and placed the same in the hands of the appellee, who was sheriff of Cook county,

to execute. The only property Eames had was the half interest in the furniture of a hotel, to the conduct of which neither he nor his partner gave any practical attention, but which was managed by one Hanna, who claimed to be in possession under a bill of sale from both partners to the father of Eames, and that he (Hanna) was managing the hotel for the father.

Thereupon the appellee required an indemnity bond, and the one circumstance which is fully established is, that the attorneys of appellant prepared a bond, in which the appellant purported to be the principal and John A. Lynch was surety, but it was not sealed by the appellant, and was objected to by the appellee for that defect, which was never cured.

It is not argued by the appellant that the appellee was not entitled to an indemnity bond under Sec. 43, Ch. 77, R. S., 1872, but it is argued that the bond was good enough if the appellant was not bound.

That a good bond, which the sheriff would be bound to accept, might be made without the appellant as principal, is beside the question.

On its face the bond was imperfect—apparently incomplete. Had the appellee accepted it, and needed recourse to it, he might have been met by the defense that Lynch signed the bond provisionally—not to be delivered until complete. We need not consider whether such defense would have been good. That it would have been at least very troublesome may be seen by consulting *Gage v. City of Chicago*, 2 Ill. App. 332; *City of Chicago v. Gage*, 95 Ill. 593; and *Comstock v. Gage*, 91 Ill. 328.

The appellee was entitled to a bond that needed no explanations, and on its face was subject to no objections.

This feature of the case makes it unnecessary to consider others.

The appellee returned the execution "no property found," and the appellant sued him for a false return. The court, trying the cause without a jury, found for the appellee, and entered judgment in his favor, which is affirmed.

Redfern v. Botham.

Sarah Ann Miller Redfern v. Thomas H. Botham.

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1. **FORCIBLE DETAINER**—*Complaint Necessary to Jurisdiction in.*—A written complaint is necessary to the jurisdiction of a justice of the peace in forcible detainer proceedings, and unless the justice has jurisdiction, the Circuit Court, on appeal, has none.

2. **SAME**—*Showing Necessary as to Filing of Complaint.*—The statement in a transcript of a justice of the peace of a "complaint filed," is not sufficient to take the place of the writing that the statute requires to be filed with the justice in order to confer jurisdiction in forcible detainer proceedings.

3. **BILL OF EXCEPTIONS**—*When Unnecessary.*—Where want of jurisdiction appears on the face of the record, it is not necessary that a bill of exceptions should be preserved, nor that anything which finds its appropriate place outside of the record proper should be made to appear.

Transcript, from a justice of the peace in forcible detainer proceedings. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

JAMES N. TILTON, attorney for appellant.

O'DONNELL & COGHLAN, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

An action, which the evidence shows was in forcible detainer, was begun before a justice of the peace by the appellee against a "Mrs. Redfern" as defendant, and upon appeal to the Circuit Court leave was given to amend by changing the name of the defendant to that of the appellant, and a judgment for restitution of certain premises being there rendered, this appeal has followed.

The transcript of proceedings before the justice of the peace shows a "complaint filed," but no complaint in writing as required by the statute, or paper purporting to be one, was transmitted by the justice to the Circuit Court, and in that court no proof was made or offered that a written complaint ever did exist and no steps were taken to restore it if

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lost. The statement in the transcript, of a "complaint filed," is not sufficient to take the place of the writing that the statute requires must be filed with the justice in order to confer jurisdiction. A written complaint is necessary to the jurisdiction of the justice in forcible detainer proceedings, and unless the justice has jurisdiction, the Circuit Court on appeal has none. Chap. 57 Ill. Rev. Stat., Sec. 5; Abbott v. Kruse, 37 Ill. App. 549.

The want of jurisdiction appeared on the face of the common law record, and it was not necessary that a bill of exceptions should have been preserved, nor that anything which finds its appropriate place outside of the record proper should be made to appear.

The judgment must be reversed and the cause remanded, in order, if possible, that jurisdiction may be shown to have existed as a foundation for a valid judgment.

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South Chicago City Railway Co. v. Calumet Electric St. Ry Co.

1. *INJUNCTIONS—Against Construction of Street Railroad.*—It is well settled law in this State that a court of chancery will not control a municipal corporation as to the use of streets by railways.

2. *CONTRACTS—Against Public Policy—Agreement of Street Railway Company not to Cross Tracks of Another Company.*—An agreement by a street railway company not to cross the track of another similar company at grade is an attempt by the company to bind itself against what the public interest may require and is void, as against public policy.

Bill for Injunction.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

CHAS. M. OSBORN and SAM'L A. LYNDE, attorneys for appellant.

MANN, HAYES & MILLER, attorneys for appellee.

Hawkes v. Taylor.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Each of these parties operate, under ordinances of the city of Chicago, lines of street railways in the southern part of the city.

In 1892, when they were laying tracks they made an agreement by which they both agreed that with the exception of crossings mentioned in the agreement, no crossing at grade by one road over the other should ever be made.

The appellee thereafter procured from the city an ordinance permitting it to put down tracks on more streets, and in putting them down it, *vi et armis*, made crossings at grade over other places than those the agreement mentioned.

The appellant filed this bill to enjoin the appellee from operating over those crossings and from making any more grade crossings.

It is thoroughly settled in this State that a court of chancery will not control a municipal corporation as to the use of streets by railways.

Phelps v. Un. El. R. R., 166 Ill. 131, affirming same case, 60 Ill. App. 471, is the last reported of the many cases to that effect.

And Doane v. Chicago City Ry., 160 Ill. 22, affirming same case, 51 Ill. App. 353, is a complete answer to all claim of the appellant under the agreement.

An agreement not to cross at grade may be—practically probably is—an agreement not to cross at all, and is void as against public policy.

The decree dismissing the bill is affirmed.

Louise R. Hawkes v. Joel V. Taylor.

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175 344

1. **CONTRACTS**—*Construction of—Mentioning Part of a Class Excludes the Remainder.*—In construing contracts the expression of one or more things of the same class will be regarded as implying the exclusion of all not expressed; and this even if the law would have implied all had none been expressed.

2. **SAME**—*General Ground of a Legal Implication.*—The general ground of a legal implication is that the parties to the contract would have expressed that which the law implies, had they thought of it, or

had they not supposed it was unnecessary to speak of it because the law provided for it.

3. *SAME—Character of Obligations Raised by Legal Implication.*—Whatever obligation is sought to be raised by legal implication must be of such a character as the court will assume would have been made by the parties had their attention been called to the subject, and their conduct inspired by principles of justice.

4. *SAME—The Rule as to Implied Obligations Applied.*—A contract for the sale of an interest in a mine provided for the payment to the vendor of a proportion of the net profits arising from the operation of the mine, but contained no provision requiring the operation of the mine. *Held*, that such a provision could not be implied, as courts have no power, by implication or otherwise, to make contracts for parties.

Assumpsit, on a contract of sale. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

STATEMENT OF THE CASE.

This was a suit brought by Louise R. Hawkes against Joel V. Taylor on the following contract:

“This agreement, made this 26th day of May, A. D. 1885, between Joel V. Taylor, party of the first part, of Cook County, Illinois, and Louise R. Hawkes, of the same place, witnesseth: Whereas, the said party of the second part has this day sold and conveyed to the party of the first part all her right, title and interest in and to the following described mining property situate in Ruby mining district in the county of Gunnison, State of Colorado, to wit, an undivided one-eighth of the Ruby mining claim, an undivided one-eighth of the Sunset lode mining claim, an undivided one-eighth of the Arab lode mining claim, an undivided one-eighth of the Peggy lode mining claim, an undivided one-eighth of the Gem lode mining claim, an undivided one-eighth of the Old Sheik lode mining claim.

Now, therefore, this agreement witnesseth, that the party of the first part is to pay as a consideration for the conveyance of the property above described, as follows:

First. Five thousand dollars (\$5,000) cash, which sum has already been paid over to the party of the second part.

Second. The party of the first part is to have the option,

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within one year, to convey to the party of the second part real estate of the cash value of ten thousand dollars (\$10,000); the value of such real estate, in case the parties can not agree, to be determined by arbitration, each party to select one arbitrator, and in case they can not agree they are to select a third, and the decision of two of such arbitrators shall be conclusive on the parties thereto; and in case said conveyance shall be made, it shall be in full payment for the said property conveyed to the party of the first part.

Third. In case said party of the first part shall not elect to make such conveyance of land as is above provided for, then the party of the first part shall be entitled to receive out of the net profits of the property so conveyed by the party of the second part the sum of ten thousand dollars (\$10,000), and after having received the sum of ten thousand dollars (\$10,000) aforesaid, he shall pay to the party of the second part one-half of the net profits of said property, until the net profits, after first deducting the sum of ten thousand dollars, shall equal forty thousand dollars each, and to begin as soon after the net profits amount to the sum of one thousand dollars, after the party of the first part shall have received the sum of ten thousand dollars from such net profits, and the party of the second part is thereafter to receive each alternate one thousand dollars of the net profits until she has received from such net profits in all the sum of twenty thousand dollars; provided, however, that in case the net profits above described do not amount to the sum of fifty thousand dollars within five years from the date of this agreement, then the party of the second part shall only be entitled to one-half of the net profits over and above the sum of ten thousand dollars to be first deducted that have accrued within five years from the date hereof. Such sum, however, in no event to exceed the sum of ten thousand dollars. This agreement shall be binding on the heirs, executors, administrators and assigns of the respective parties.

JOEL V. TAYLOR.

LOUISE R. HAWKES."

The declaration alleged that plaintiff conveyed the property described in the contract; that she received \$5,000 in cash, but no real estate; that defendant did not work the mines, but sold same shortly after the conveyance to him, to other parties, thereby disabling himself from working the mines, and that plaintiff has not been paid any sum for net profits, and has been damaged \$30,000. The common counts were added.

The defendant pleaded the general issue and several special pleas. After demurrers by plaintiff the following special pleas remained:

"Third. That defendant owned only an undivided one-eighth of the mine, the residue being owned and controlled by plaintiff and her associates; that these latter refused to work the mine and prevented defendant from so doing, though defendant was always ready to contribute his share.

Sixth. That defendant owned only one-eighth in the mine; that plaintiff and her associates formed a corporation to take the property; that at their request defendant joined with them and conveyed to the corporation; that after the formation of the corporation and conveyance to it of the mines, defendant held a minority of the stock, the majority being owned and controlled by plaintiff and her associates; and that defendant always stood ready to contribute his share to the working of the mines, but the others refused to work same."

Plaintiff replied to third plea by denying that she and her associates owned the remainder of the mines or controlled the working thereof, or prevented defendant from working them, or that defendant was ready to contribute any money for working said mines. She then alleged that after selling one-eighth to defendant she had remaining an eighth interest. This interest she sold to him, but at his request retained it till the formation of a corporation by defendant, and then, pursuant to his request, conveyed direct to the corporation. Certain shares of stock were issued to her and stood in her name on the books of the company, but were in fact not hers, but nominally held by her to legally

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qualify her to act as a director. She was made a director, and remained nominally such at defendant's request. The defendant, however, was elected president, treasurer and general manager of the company, and had complete control thereof.

To the sixth plea she replied by denying the allegations thereof and alleging more at length the sale by her to defendant of her remaining one-eighth interest, the retention by her of the record title, the conveyance of it by her to the corporation formed by defendant, the issuance to her of five hundred shares of stock which nominally stood in her name to enable her to be elected a director, and the assignment at once by her of all her stock but the five hundred shares to defendant—all at defendant's request. She further alleges that defendant was elected and continued to be the president, treasurer and general manager of the corporation; that he had supreme control thereof, and that she never participated in any meetings nor shared at all in the control and management of the company.

Defendant rejoined by denying his exclusive control of the mines and alleging that plaintiff and her associates controlled a majority of the stock of the corporation.

He also alleged that the company worked the mines in good faith, expending thereon \$20,000; but they were unproductive, and although the five years mentioned in the contract had expired, no net profits had ever been derived from the mines.

The case was tried before a jury. At the close of plaintiff's direct evidence, defendant's counsel moved the court to instruct the jury to return a verdict for defendant, which motion the court overruled, whereupon defendant testified in his own behalf and offered some documentary evidence, at the conclusion of which the court, of its own motion, instructed the jury to return a verdict for defendant, which was accordingly done, the court refusing to permit plaintiff to introduce evidence in rebuttal, which plaintiff offered to do.

On the trial plaintiff proved contract with Taylor, intro-

ducing her deed to him of the mining interests described in the contract, also deed of same interests by Taylor to the corporation. Evidence was introduced tending to show that Taylor paid Mrs. Hawkes the \$5,000 as called for in the contract, and no more; that Taylor, upon the organization of the corporation, became president, treasurer and general manager, and continued as such until the time of the trial, and as such had full management and control of the mines; that the corporation made no profits out of the mines, but expended several thousand dollars in working them. That Mrs. Hawkes was one of the directors in said corporation.

The plaintiff offered evidence tending to prove that Mrs. Hawkes was only nominally a stockholder and director; that she became such at Taylor's instance and request; that she refused to have anything to do with the company, and refused to attend any meetings of stockholders or directors thereof; that the mines were not worked in a minerlike fashion; that the proper appliances and machinery were not employed and used, and that they could have been worked so as to produce large profits. All of this evidence was excluded by the court, and plaintiff duly excepted.

R. M. WING, C. C. CARNAHAN and D. J. HAYNES, attorneys for appellant.

The law will imply from the contract sued on, that if the defendant, Taylor, did not elect, within one year, to convey to the plaintiff, Mrs. Hawkes, the real estate therein specified, that he would within the five years duly and properly work and develop the several mining claims so conveyed to him, to the end of producing the specified net profits. *Berger v. Peterson*, 78 Ill. 633; *Nichols v. Mercer*, 44 Ill. 250; *Oliphant v. The Woodburn Coal & M. Co.*, 63 Ia. 332; *Skidmore v. Eikenberry*, 53 Ia. 621; *Potter v. Ontario & Livingston M. Ins. Co.*, 5 Hill (N. Y.) 147; *Roy v. Hodge*, 13 Pacific Rep. 599; *Allamon v. The Mayor, etc., City of Albany*, 43 Barb. (N. Y.) 33, 37.

A contract must be performed in the way the parties to

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it understand it at the time of its execution. *Potter v. Ontario & Livingston M. Ins. Co.*, *supra*; *Walker et al. v. Tucker et al.*, 70 Ill. 527.

The plain implication of the contract is, that the defendant knew at the time he entered into it that the mines were valuable and well worth undertaking, else why did he not reserve an exception in his contract to excuse its performance as made? This he should have done if he designed to take advantage of the fact or treat the transaction as an experiment.

For a contract must be performed as made. *Stow v. Russell*, 36 Ill. 20; *Bacon v. Cobb*, 45 Ill. 47.

The execution of the contract obligated Taylor to either work the mines or to cause them to be worked with a view of producing profits, and not only to work them but to work them as a prudent man would work his own property. *Walker et al. v. Tucker et al.*, 70 Ill. 527; *Taylor's Landlord and Tenant*, Sec. 344; *Skidmore v. Eikenberry*, 53 Iowa, 621.

GEO. W. WILBUR and NEWTON A. PARTRIDGE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

Appellant claims that appellee was by the contract bound to "do everything which would be necessary to effectuate the purpose of the transaction, *i. e.*, to make the mining interests conveyed to him by Mrs. Hawkes produce for her the \$20,000 profit, if possible.

If appellee and appellant so intended, the question arises why, by a few simple words, they did not put such agreement in the contract.

Appellant insists that the contract contains that which is not there in terms, nor by necessary implication.

It seems that in making this contract the attention of the parties must have been drawn to the question of whether appellee was bound to go on and develop these mines, re-

gardless of what the prospect for profitably doing so might be, and that the failure of the parties to stipulate that he should do so, indicates that appellee did not intend to so agree, nor did appellant understand that he had so promised. If appellee did, directly or impliedly, so promise, that he can not by any transfer relieve himself from the obligation is manifest.

Courts do not, by implication or otherwise, make contracts for parties.

The question in this regard is: What contract did the parties make?

The general ground of a legal implication is, that the parties to the contract would have expressed that which the law implies had they thought of it, or had they not supposed it was unnecessary to speak of it because the law provided for it.

The expression of one or more things of the same class, implies the exclusion of all not expressed; and this even if the law would have implied all, had none been expressed. *Parsons on Contracts*, Vol. 2, 515; Vol. 1, 555, 6th Ed.

Whatever obligation is sought to be raised by legal implication must be of such a character as the court will assume would have been made by the parties had their attention been called to the subject, and their conduct inspired by principles of justice. *Dermott et al. v. The State*, 99 N. Y. 101-109; *King v. Leighton*, 100 N. Y. 386-391; *Genet v. Del. & Hudson Canal Co.*, 136 N. Y. 593.

Courts, in reading into contracts implications not clearly there existing, trench upon dangerous ground.

The judgment of the Superior Court is affirmed.

Louise C. Clarke v. William E. Chamberlin et al.

1. PARTIES—*Persons Described as Unknown Owners*.—Where a person was made a party to a bill as the unknown owner of a note, but filed an answer and cross-bill, he is bound by the decree, although the bill was not amended so as to make him a party by name.

Clarke v. Chamberlin.

2. NOTICE—*Proof of Publication of.*—The publication of a notice of a sale of real estate under a decree of foreclosure may be proved by the certificate of the publisher of the paper printing such notice, with a copy of such notice annexed, stating the number of times the same has been published, and giving the dates of the first and last papers containing such notice; such certificate need not show the date of other publications.

Bill, for redemption from mortgage sale. Appeal from the Circuit Court of Cook County; the Hon. MURRAY F. TULEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897.

WILBUR N. HORNER, attorney for appellant.

None are parties, although named in the bill, against whom process is not prayed. Story Equity Pleading, par. 44.

The defendants are the persons against whom process is prayed. It is not sufficient that a person be mentioned as a defendant; process must be actually prayed against him. Mitford & Tyler's Pleadings, page 17.

If party is known, can not be treated as an unknown owner. Mulvey v. Gibbons et al., 87 Ill. 377.

A decree does not bind a person who, though joined in the bill, is not in some way brought in or put in default. Pope v. North, 33 Ill. 441.

A sale is void if made on a different notice than that ordered in the decree. Glen v. Wolten, 3 Md. Ch. 514; Reynolds v. Wilson, 15 Ill. 395.

The certificate should show that all the requirements of the statute have been complied with. Finch v. Pinckard, 5 Ill. 69.

The date of the publication of the notice should appear in the affidavit. Milam v. Thomasson, 7 Mon. (Ky.) 324; Tevis v. Richardson, 7 Mon. (Ky.) 654; King v. Harrington, 14 Mich. 532.

An affidavit of publication for "six successive weeks" does not show that the publication was made "once in each week" for the period stated. Godfrey v. Valentine, 39 Minn. 336.

An affidavit that a summons was published "six weeks

successively" does not show a compliance with a statute requiring publication for "not less than once a week for six weeks." *Frisk v. Reigleman*, 75 Wis. 499; *Ramsey v. Hommel*, 68 Wis. 12; *Morris v. Carmichael*, 68 Wis. 133.

LYMAN M. PAINE, attorney for appellee, Wm. E. Chamberlin.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

May 20, 1896, the appellant filed this bill to redeem from a sale under foreclosure made January 29, 1895, to Chamberlin.

She bases her right to redeem upon two grounds:

First. When the foreclosure suit was commenced she was the holder of a note made by a remote grantee of the mortgagor, payable to himself and by him indorsed, which was secured by a trust deed upon the same property.

The trustees named in that deed of trust, and the unknown owners of the note she held were made defendants to the bill to foreclose, and she appeared and answered and filed her cross-bill in the suit as the owner of the note, and a decree was entered which provided for the payment to her of what was due to her, first satisfying the demands of the prior mortgagee.

On this state of facts she says that the bill to foreclose never having been amended so as to make her a party defendant by name, she was no party to the decree, and not barred of her right to redeem as a subsequent incumbrancer, though the lapse of time had cut off the right of the defendants to the suit. She was a party by her answer and cross-bill. *Marsh v. Green*, 79 Ill. 385. She is bound by the decree.

Her second ground of attack is that the certificate of publication of notice of the sale in accordance with the decree is not sufficient. The certificate is:

"Review Printing and Publishing Company, publishers of the Chicago Daily Law Bulletin, do hereby certify that a notice, of which the annexed printed slip is a true copy, was published for three successive weeks, to wit, three times in the Chicago Daily Law Bulletin, a public daily newspaper

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published in the city of Chicago, county of Cook and State of Illinois, and of general circulation throughout said county and State, and that the date of the first paper containing the same, was on the 6th day of February, A. D. 1895, and that the date of the last paper containing same was the 20th day of February, 1895, and that we have received \$11 for publishing the same.

Dated at Chicago, this 21st day of February, 1895.

(Signed) REVIEW PRINTING AND PUBLISHING COMPANY,
Publishers.

[SEAL] By D. G. NEWELL, Secretary."

And the criticism of the appellant that it does not show the date of the second publication should be addressed to the legislature, and not to the courts. *McChesney v. People*, 145 Ill. 614.

The decree, dismissing the bill on demurrer, is right, and it is affirmed.

Samuel H. Hansen and Theodore Sonnicksen v. The United States Brewing Co., etc.

1. **BILL OF EXCEPTIONS**—*References to Matters Following Judge's Certificate.*—The words "For instructions and motion for a new trial see next page," in a bill of exceptions, are sufficient to make the instructions and motion referred to a part of such bill of exceptions, although they follow the certificate of the trial judge.

2. **SAME**—*Presumptions as to Different Handwritings in.*—There can arise no presumption adverse to the authenticity of a bill of exceptions from the mere fact it is in various handwritings.

3. **CONTRACTS**—*Implied Warranties.*—A made a contract with B by which he was to purchase 2,000 barrels of beer from B, deliveries to be made from time to time as requested; at the same time he received from B \$300, to be retained if the contract was complied with by him, otherwise to be returned. After a time A refused to receive any more beer because of its claimed poor quality and unfitness for use in his business. *Held*, that the contract contemplated the delivery of beer of a merchantable quality in A's business, and that a refusal by A to receive beer not of that quality, did not constitute a breach of the contract authorizing a recovery of the \$300.

Assumpsit, on the common counts. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897. Rehearing denied. Opinion filed June 14, 1897.

ENNIS & COBURN, attorneys for appellants.

The law demands that if a man sells generally he undertakes that the article sold is fit for some purpose; if he sells for a particular purpose, he undertakes that it shall be fit for that particular purpose. *Jones v. Bright*, 5 Bing. 533.

The law most explicitly requires a manufacturer to warrant, by implication, as fit for the purpose required, the article sold, whether the order of the sale be in writing or verbal. *Bagley v. Cleveland Roll Mill Co.*, 21 Fed. Rep. 159.

The true distinction is that when the goods purchased of a manufacturer are to be made, or are not susceptible of examination, there is an implied warranty; and that there is also an implied warranty notwithstanding the goods may be subject to examination where the defects are latent and the vendee clearly relies on the skill and judgment of the maker, etc. *Beals v. Olmstead*, 24 Vt. 114; *Kellogg Bridge Co. v. Hamilton*, 110 U. S. 108; *French v. Vining*, 102 Mass. 132; *Jones v. Just*, L. R., 3 Q. B. 197; *Parson on Con.* (5th Ed.), 536 and note a; *Biddle on Chat. War.*, 8, Secs. 174-182.

Breach of warranty is a question of fact for the jury. *Lanz v. Wacks*, 50 Ill. App. 263; *Avery Plant Co. v. J. L. & W. D. Rigg*, 56 Ill. App. 599; *Jones v. Bright*, 5 Bing. 533.

As to the law in this State on implied warranty we cite: *Babcock v. Trice*, 18 Ill. 420; *Thorne v. McVeagh*, 75 Ill. 81; *Crabtree v. Kile*, 21 Ill. 180; *Aultman v. Webber*, 23 Ill. App. 91; *Murray v. Carlin*, 67 Ill. 286.

WINSTON & MEAGHER, attorneys for appellee.

The bill of exceptions is esteemed as a pleading of the party alleging the exception. If liable to the charge of ambiguity, uncertainty or omission, it must be most strongly construed against the party who prepared it. *Rogers v. Hall*, 4 Ill. 6; *Alley v. Limbert*, 35 Ill. App. 592.

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The appellant must be responsible for all uncertainties and omissions in the bill of exceptions. A plausible conjecture that certain facts occurred at the trial will not be enough to justify the Appellate Court in assuming that those facts did exist. *Spangenberg v. Charles*, 44 Ill. App. 526; *Alley v. Limbert*, 35 Ill. App. 593; *Matson v. The People*, 50 Ill. App. 210; *Page v. Northwestern Brg. Co.*, 54 Ill. App. 158; *Wright v. Griffey*, 44 Ill. App. 115; *Stock Quotation Telegraph Co. v. Board of Trade*, 44 Ill. App. 358; 144 Ill. 370; *A., T. & S. F. R. R. Co. v. Baltz*, 44 Ill. App. 458.

A paper attached to a bill of exceptions after the signature of the trial judge should not be considered. Nor will the instructions so appended instead of being copied therein. *Hursen v. Lehman*, 35 Ill. App. 489; *C., M. & St. P. Ry. Co. v. Harper*, 128 Ill. 384.

Before an Appellate Court will reverse a case for error other than that appearing in the record proper, it is imperative that the bill of exceptions itself over the signature and seal of the judge show, first, that a motion for a new trial was made; second, that it was denied; and, third, that an exception was taken to such denial. *Shedd v. Dalzell*, 30 Ill. App. 357; *James v. Dexter*, 113 Ill. 654; *Engel v. Sellers*, 51 Ill. App. 577; *City of Mt. Vernon v. Satterfield*, 53 Ill. App. 39; *Griffith v. Welsh*, 32 Ill. App. 396.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

A motion is made by appellee to strike from the records pages 78 and 79 thereof, being the sheet next following the page in the bill of exceptions upon which appears the certificate and seal of the trial judge.

Upon page 77, on which appears the certificate and seal of the trial judge, there is written above such signature the following:

“(Here insert the instruction given, and the motion for a new trial, filed Dec. 19, 1896.) F. Q. B.”

Such initials being those of the name of the trial judge, and the sentence, as well as they, being apparently in his handwriting.

To the left of such sentence there is written in ink in a different handwriting, as follows :

“ For instructions and motion for new trial see next page.”

And said “ next page,” and the page following on the same sheet of paper, are the pages 78 and 79 which are moved to be stricken from the record.

If we were to follow former decisions of our own, we should be constrained to grant the motion, but the Supreme Court has said we were wrong. *Legnard v. Rhoades*, 156 Ill. 431, and the motion is denied.

There can arise no presumption adverse to the authenticity of a bill of exceptions from the mere fact that it is in various handwritings.

The appellee was engaged in the business of brewing and selling beer, and on March 2, 1894, the appellants, who were beer bottlers and peddlers, began to purchase beer from the appellee, and so continued to do from day to day for the space of two weeks. Then, on March 16, 1894, a contract in writing was entered into between the parties, whereby the appellee loaned to the appellants \$300 and agreed to furnish them with 2,000 barrels of keg beer at the price of four dollars per barrel, and appellants agreed to pay for the beer at such rate or price upon delivery, deliveries to be made when requested by appellants.

And it was further agreed that if appellants should well and truly perform their agreement and take and pay for said 2,000 barrels, the said \$300 loaned should belong to them, but there was given to the appellee the right to terminate the contract and to have refunded to it the said \$300, with interest, as liquidated damages, for a breach by appellants of any of the covenants or agreements of the contract.

The contract was lived up to by both parties until sometime in May, 1894, when some of the beer that had been delivered was returned because of its claimed poor quality and unfitness for use by appellants. An interview between the parties resulted, and disagreements arising between them about the quality of the beer being as contracted for

and as compared with former deliveries, etc. No further deliveries were made or offered on the one hand or requested on the other.

This action was then brought by the appellee to recover from appellants the said three hundred dollars and interest.

At the conclusion of the evidence the court took the case from the jury by a peremptory instruction to find the issues for the plaintiff, and to assess the damages at the sum of \$352.50, being three hundred dollars and accrued interest.

A special plea, filed by the appellants to a special count upon the contract, having been mislaid, it was stipulated at the beginning of the trial as follows:

“It is stipulated and agreed by and between the plaintiff and defendants herein that under the special plea heretofore filed by defendants any evidence may be offered touching the quality of the beer furnished by the plaintiff to the defendants, or touching any warranty or implied warranty which may have been made by the plaintiff to defendants in relation to the same, which, under any circumstances, could be competent evidence.”

It is probable that every defense open to the appellants under either their special plea or the above stipulation could have been made under the general issue.

It can not be denied that the contract between the parties contemplated the delivery by the appellee of beer that was of a merchantable quality for the business of the appellants, and whether the beer that was furnished, and that appellee was able and willing to furnish, was of such quality, was a question of fact for the jury. The mere fact that a few barrels of the beer that was furnished was of a poor quality and not fit for a beverage, would not have justified the appellants in refusing to accept any more beer from the appellee, but if it were of such unfit character, and appellee either could not or would not furnish such as the contract called for, then the appellants would have been justified in declining to accept any more of such bad quality, and in so declining would not have committed a breach of their contract.

There was evidence on both sides that appellee's manager,

Mr. Gunderson, said to appellants at the interview had with them, that he was delivering the best beer he could, and that it was just as good then as it was when they first commenced to take it.

The beer being the best that appellee could deliver, it became an important question of fact whether it was as good as that formerly delivered and merchantable and fit for use within the contemplation of the contract. The determination of such questions was of vital importance in determining whether appellants were guilty of a breach of contract, for if they were, a recovery against them would be proper, but not otherwise.

A *prima facie* case of a breach of the contract by the appellants was made out when the appellee proved that the appellants said they would not take any more of the kind of beer that appellee had been lately delivering and was ready to continue to deliver, and it became then the privilege and right of appellants to show, if they could, why they so declined, so as to avoid the effect of such *prima facie* breach on their part. The defense appellants sought to interpose to the action was not by way of recoupment for damages, but was that they were not guilty of the breach alleged against them, leaving out all question of damages that they might claim because of the breach being by the appellee.

This latter defense the appellants attempted repeatedly to establish by offering to prove by several witnesses that the beer was not merchantable and could not be used as a beverage; that it was "rotten," etc., and that it was not of the quality of that formerly delivered.

It was error by the trial court to refuse to admit such testimony, and the judgment will be reversed and the cause remanded.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

"Homer sometimes nods."

The counsel for the Brewing Company have not caught the meaning of this court in the opinion heretofore filed. That meaning is that if the Brewing Company would not, at

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all, furnish beer of merchantable quality—which both sides assumed had been furnished before the contract was made—it could not recover the \$300, even if the appellants would not take the bad beer.

The Brewing Company was bound to deliver beer of the quality the contract contemplated.

It could not refuse to deliver any beer (if the appellants would take and pay for it,) and recover the \$300.

Suppose by the increase of the tax on beer, or by some increased cost of ingredients, the market price of beer had so gone up that the Brewing Company concluded not to sell any more to the appellants at \$4 per barrel, could it have stopped the supply and reclaimed the money they had loaned?

We do not think that the counsel of the Brewing Company would claim that. Now what is the difference between a direct refusal to furnish any beer, and a refusal to furnish any of the quality contemplated by the contract?

The petition is denied.

South Chicago City Ry. Co. v. Christian Walters.

1. INSTRUCTIONS—*Should be Based on the Evidence.*—Where there is no evidence that a plaintiff suing for personal injuries will suffer any loss of time or of ability to work in the future because of the injuries received, it is improper to instruct the jury that they may allow damages for future loss of time or of ability to work, if any, resulting from such injuries which they may believe the plaintiff will sustain.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897.

OSBOEN & LYNDE, attorneys for appellant.

JOHN F. WATERS, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought to recover damages for personal injuries sustained by appellee while driving upon a public street, by being run into by an electric car operated by the appellant company in South Chicago, and resulted in a judgment for \$3,500, entered upon a verdict for \$5,000 in favor of appellee.

The case, as made by the evidence, was a close one, and demanded the giving of correct instructions to the jury.

The third instruction, given at the instance of appellee, was in substance like the fifth instruction approved by the court in *H. & St. J. R. R. Co. v. Martin*, 111 Ill. 219, at page 227, and again approved in *city of Chicago v. McLean*, 133 Ill. 148, except the following addition: "and any future loss of time and inability to work, if any, resulting from such injuries which the jury may believe the plaintiff will sustain; and may find for him such sum as in the judgment of the jury, under the evidence, will be a fair compensation for the injuries, if any, which the jury may believe from the evidence he has sustained."

There is but very little evidence, and that is of an exceedingly uncertain and shadowy character, that appellant will suffer any loss of time or inability to work in the future because of the injuries received.

The accident happened nearly three years before the trial took place, and at the trial appellee testified that six weeks after he was hurt he went to work again at his previous employment, and had worked ever since without the loss of a single day.

In the face of such evidence, and with no certain evidence that appellee has not entirely recovered from his injuries, it was error of a seriously prejudicial kind to instruct the jury that they might give the appellee compensation for such future loss of time and inability to work as they might believe (without regard to the evidence) he will sustain.

For such error the judgment will be reversed and the cause remanded.

Samuel Davis v. A. F. Gibson.

1. **BUILDING CONTRACTS—Certificate of Architect Final Except in Case of Fraud or Mistake.**—Where work on a building is done under the supervision of an architect chosen by the parties, the owner of the building can not be allowed to urge defects in the work. The decision of the architect must be final and binding, unless it be shown that his certificate is the offspring of fraud or mistake.

2. **SAME—Fraud or Mistake of Architect in Issuing Certificate—How Shown.**—Fraud or mistake on the part of an architect in issuing a certificate to a building contractor can not be shown by submitting to a jury evidence as to the quality of the work, but only by evidence touching the architect himself, to show that he did not exercise his real judgment.

3. **SAME—Fraud or Mistake of Architect in Issuing Certificate—Injunctions Against Architects.**—The defendant in a suit on an architect's certificate, in order to impeach such certificate, offered in evidence the record of a chancery suit begun by himself against the architect to restrain the latter from further acting as architect, but it did not appear whether such suit was begun before or after the certificate was issued, or whether the holder of the certificate had notice. *Held*, that the record was not admissible.

4. **APPELLATE COURT PRACTICE—New Points Can Not be Made on Petition for Rehearing.**—A point not made in the original brief can not be raised on rehearing even on petition of an appellee.

5. **EVIDENCE—To Impeach a Witness Should be Offered Specifically.**—It is not error for a court to refuse to admit evidence which constitutes no defense to an action, but which may be proper for the purpose of impeaching a witness when such proof is offered as a defense alone. To make it admissible it should be offered for the purpose of impeachment and not as a defense.

Assumpsit, on an architect's certificate. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed May 24, 1897. Rehearing denied. Opinion filed June 14, 1897.

COWEN & HOUSEMAN, attorneys for appellant.

WILLIAM H. SAFFORD, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.
Efforts to avoid certificates of architects, given in pursu-

ance of provisions in building contracts, by submitting the question of performance of the contract to review by a jury, have been so often unsuccessful, that counsel could not reasonably hope to be successful in the present effort of that character. "It is in vain to allege defects in the work when the whole work was done under the eyes of architects chosen by appellant. Their decision must be final and binding, and their certificate conclusive, unless it be shown such certificate is the offspring of fraud or mistake connected with the issuing or the obtaining such certificate." *Lull v. Korf*, 84 Ill. 225.

And such fraud or mistake can not be shown by submitting to a jury evidence as to the quality of the work, but only by evidence touching the architect himself, to show that he did not exercise his real judgment. *Arnold v. Bour-nique*, 44 Ill. App. 199, 144 Ill. 132.

Evidence offered by the appellant, to show "defective work of appellee," was rightly rejected. The appellee put in evidence two architect's certificates, and the appellant offered in evidence an affidavit of the architect that the last one was issued subject to a proviso not named in it. The appellant presents no argument or authority that the affidavit was admissible. It was not offered as impeaching the architect, for his testimony denying the proviso did not come in until afterward.

The court rightly rejected the affidavit.

The appellant offered in evidence the record of a chancery suit begun by himself against the architect to restrain the latter from further acting as architect.

Whether that suit was begun before or after the certificates were issued, and whether the appellee ever had any notice of the suit, the abstract does not show. Any discussion of the question whether, if the appellee had notice of an injunction against the architect issuing certificates at the time his were issued, such certificates would avail him, would be irrelevant.

The record was rightly rejected.

There is no error in the case, and the judgment is affirmed.

MR. JUSTICE GARY ON PETITION FOR REHEARING.

It now, for the first time, comes to our notice that the affidavit of Myers was offered in evidence after, as well as before, he testified; but it was never offered as for the purpose of impeaching him, but only as evidence generally—that is, to prove the fact that his final certificate was subject to a proviso not named in it.

In this petition is the first allusion, below or here, by the appellant to the competency of the affidavit as impeaching Myers.

A point not made in the original brief can not be raised on rehearing, even on petition of an appellee. *Marthaler v. Druiding*, 58 Ill. App. 336, which cites *Gaines v. Williams*, 146 Ill. 450, where the point was decided. *Railway Conductors v. Leonard*, 166 Ill. 154.

When the affidavit was offered, after Myers had testified, it should have been offered specifically as impeaching him. *Byler v. Asher*, 47 Ill. 101. Offered, as it was, generally, rejecting it was no error.

The petition is denied.

70	275
189	302

North Packing and Provision Co. v. Western Union Telegraph Co.

1. **TELEGRAPH COMPANIES—Place of Performance of Contract With.**—Where a telegraph message, sent from a place outside of the State is to be delivered in this State, the contract between the sender and the telegraph company is to be performed here, and will be construed in accordance with the laws of this State.

2. **SAME—Contracts on Back of Blank.**—The conditions on the back of a telegraph blank, when not assented to, form no part of the contract between the sender and the telegraph company.

3. **SAME—Contract Exempting Company from Liability Void.**—A condition printed on a telegraph blank, by which the sender of a message exonerates the company from liability, beyond the amount paid, for an incorrect transmission of the message, is against public policy and void.

4. **SAME—Effect of Stipulation Requiring Repetition of Message.**—A

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stipulation in a telegraph blank exempting the company from liability for damages unless the telegram is repeated and an additional charge paid, does not protect the company from liability for damages which such repetition could have no tendency to prevent.

5. **NEGLIGENCE—Duty of Person Injured by.**—The law imposes upon a person injured by the negligence of another the duty of making reasonable efforts to render that injury as small as possible; and it does not permit him to recover damages for any increase of loss consequent upon a failure to perform that duty. This rule does not prescribe particular acts, however, but only a line of conduct. The duty is to make reasonable efforts to render the injury as small as possible; what acts such efforts should consist of, depends upon the circumstances of the particular case.

6. **BURDEN OF PROOF—That a Different Line of Conduct Would Have Reduced Damages.**—A defendant alleging that a different line of conduct upon the part of a plaintiff suing for damages would have reduced the damages, has the burden of proving that proposition.

Assumpsit, for failure to deliver a telegram. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed May 24, 1897. Rehearing denied. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

Appellant (plaintiff below) was and had been for years prior to August 1, 1893, engaged in the business of slaughtering, packing and selling hogs, and the product thereof, in or near Boston. Appellant bought the live hogs so used in its business, at the Union Stock Yards at Chicago, at which latter point it had a purchasing agent named L. B. Kent, whose sole and only business was to purchase, pay for and ship the hogs from the Union Stock Yards to the appellant at Boston. The customary method of doing business was for appellant to send a telegram to Kent at the beginning of each week, or at the end of the preceding week, stating about the total number of cars of hogs he should purchase and ship during that week, and thereupon Kent would make proportionate daily purchases and shipments to appellant, subject at all times to any different or countermanding order from appellant. In accordance with its usual custom, appellant sent to Kent a telegram on Saturday night, July 29, 1893, instructing him to ship ninety cars of hogs during

the week following. This telegram was received by Kent on the following Monday morning, and thereupon Kent purchased and shipped, on that day, twenty-one cars of hogs; at 4:15 o'clock in the afternoon of that day (Monday, July 31), appellant delivered to appellee, at its office in Boston, a telegram addressed to its said purchasing agent, at said Union Stock Yards, which read as follows:

“JULY 31, '93.

L. B. Kent, Union Stock Yards, Chicago, Ill.:

Buy nothing Tuesday; average shipment answer for Wednesday unless low day; week's order unchanged.

NORTH PACKING & PROVISION CO.”

At the time of delivering said telegram, appellant paid to appellee the compensation demanded and required by appellee, to wit, the sum of sixty-two cents, for the transmission and delivery of the same, it being a day message.

This telegram was received at the branch office of appellee, at Union Stock Yards, on the same day it was sent, at 4:32 P. M., after Kent had gone home.

On Tuesday morning, about six o'clock, Kent called at appellee's said branch office and inquired if any message had been received for him, but this telegram was overlooked, and Kent was informed nothing had been received. Kent immediately went to the yards and commenced buying hogs, under his general orders for the week, and continued to purchase until about eight o'clock A. M., when the telegram last referred to was delivered to him from appellee's office, whereupon Kent at once quit buying, paid for the purchases already made, and shipped the same to appellant. The purchases so made by him were as follows: 496 hogs, weighing 141,770 pounds (six double deck car loads); average price paid, \$5.41½ per hundred; total amount paid for same, \$7,678.58. After receiving said telegram Kent wired to appellant the information that said telegram had not been delivered to him until he had bought six cars of hogs, which message appellant received at Boston at 1:20 August 1st. Afterward, on the same day, C. W. Henderson, manager of appellee's business at Boston, received from the

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agent of appellee at Chicago a telegram, which was in the words and figures following, to wit:

“ BOSTON, Aug. 1, 1893.

C. W. Henderson, Mgr. :

Your 178 yesterday, L. B. Kent, Union Stock Yards, Chicago, signed N. P. & P. Co., check 14 paid, rec'd 4:20 P. M., after addressee had gone home; he called about 6 A. M. to-day at our office in the yards, but through an oversight of a new operator, message was overlooked and was informed nothing received; delivery was finally made at 8 A. M. to-day.”

A copy of which last mentioned telegram was afterward delivered by said Henderson to appellant at its office in Boston.

On or about August 5, 1893, appellant presented to appellee the following claim in writing, upon the regular bill head of appellant, to wit:

“ NORTH PACKING AND PROVISION CO.,

BOSTON, August 5, 1893.

Sold to Western Union Tel. Co., City.

Claim for loss sustained on account of not delivering message to our buyer, L. B. Kent, when called for by him. The message was finally delivered after six cars hogs had been purchased, as per copies of telegrams attached :

Avg. cost of 6 cars, bot. 8-1-93.....\$5.41½

“ “ “ hogs, bot. 8-2-93..... 4.55

141,770 lbs. hogs. bot.

Aug. 1, 1893, at 86½..... 1,226.31.”

After receiving said claim and examining the papers relating thereto appellee declined to pay the same, advising appellant “ that the responsibility is limited under the conditions of the message blank in cases of this kind to the amount of telegraph charges, sixty-two cents, which will be refunded to you on application.”

Upon the trial of the case it was proved that the only general market place for live hogs in Chicago was at the Union Stock Yards, where appellant, through its said purchasing agent, L. B. Kent, made its purchases; that the price paid for the said six carloads of hogs, bought by him

on August 1, 1893, was the fair cash market value of said hogs then and there.

The hogs bought August 1st were shipped by Kent to appellants at Boston, about 12 o'clock, in the usual way.

The hogs that Kent purchased and shipped were slaughtered and packed by appellant.

Kent had been acting as buyer at the yards for appellant for six years, and during all that time he never sold a shipment of hogs, and did nothing else except to buy and ship them to appellant at Boston.

Appellant then offered and attempted to prove that the fair cash market price of hogs in the market at the Union Stock Yards, Chicago, on and after August 2, 1893, was about 86½ cents per hundred pounds lower than it was on Tuesday, August 1st, when these six cars of hogs were purchased, by reason of the failure and neglect of appellee in delivering the telegram in question; and that in consequence thereof, appellant sustained a loss and damage of about \$1,200.

For this purpose the witness, Kent, was asked, among other things, as follows:

"Q. What was the market price on the next day, August 2d, at the Union Stock Yards?

* * * * *

Q. What could the same hogs (bought August 1st) have been bought for next morning, August 2d?

Q. If you made any purchases on the next day, to wit: on August 2d, you will please state what purchases you made, and at what prices?

Q. What was the fair, cash market price of hogs in the market at the Union Stock Yards, Chicago, on and after August 2, 1893?

* * * * *

Q. Was the market price on that day, August 1st, higher or lower than the market price on the following day, August 2d, and subsequently?"

Each and all of the foregoing questions were objected to by counsel for appellee as incompetent, irrelevant and

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immaterial, and the objections sustained by the court, and exceptions by counsel for appellant.

After having proved the facts hereinbefore shown, and after having offered and attempted to prove the facts and others last above mentioned, appellant rested its case, and the court on motion of counsel for appellee found in favor of appellee and rendered judgment against appellant for costs. From which finding and judgment appellant has taken this appeal.

ALBERT H. VEEDER and MASON B. LOOMIS, attorneys for appellant.

WILLIAMS, HOLT & WHEELER, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The message was to be delivered in Chicago; the contract was thus to be performed there, and is to be construed in accordance with the law of Illinois. *Lex loci solutiones*. Leake on Contracts, 855.

The conditions upon the back of the message, not having been assented to by appellant, formed no part of the contract; the contention of appellee that its liability is limited to the sixty-two cents paid for sending the message, is not the law in this State. Tyler, Ullman & Co. v. W. U. Tel. Co., 60 Ill. 424; W. U. Tel. Co. v. Tyler, 74 Id. 168; W. U. Tel. Co. v. Harris & Comstock, 19 Ill. App. 347.

A repetition of the message would not have tended to prevent the breach of the contract by appellee.

A stipulation as to repeating a message does not protect the company from liability for damages which repetition could have no tendency to prevent. Fleischner v. Pacific Postal Tel. Cable Co., 55 Fed. Rep. 738; True v. International Tel. Co., 60 Me. 9.

"The law imposes upon a person injured by the negligence of another the duty to make reasonable efforts to render that injury as small as possible; and it does not

permit him to recover damages for any increase of loss consequent upon a failure to perform that duty." Gray on Communication by Telegraph, Sec. 100.

This rule does not prescribe particular acts, but a line of conduct. The duty is to make reasonable efforts to render the injury as small as possible; what acts such efforts should consist of depends upon the circumstances of the case.

When appellant obtained knowledge of the negligence, the hogs were on their way to Boston; it was too late to sell them otherwise than in transit, and whether this was practicable does not appear.

When the hogs arrived, if ever, in Boston, it is probable that appellant could then have sold them in open market, and adding to their cost the expense of carriage and sale, might have thus ascertained the loss, if any there were. But was he bound to do this?

The hogs were not purchased by appellee for sale, but to be manufactured into pork, etc. It does not appear that appellee had any reason for thinking that by at once throwing these hogs upon the Boston market the loss would have been lessened.

What the expense of transferring them to the Boston or any other market and there selling, or what the result of so doing would have been, does not appear.

The burden of proving that a different line of conduct would have reduced damages, is upon the negligent party, appellee. Sedgwick on Damages, Vol. 1, Sec. 227; Shearman & Redfield on Negligence, Sec. 598.

If appellee had complied with its contract to promptly deliver the message, no hogs would have been bought on Tuesday, while, as instructed by the telegram, upon Wednesday the average shipment would have been purchased.

The average shipment appears to have been fifteen car loads per day.

The telegram was delivered so that but six car loads were purchased on Tuesday.

The damage to appellant is the difference in price between the six car loads bought through the negligence of appellee on Tuesday and the cost of such property on Wednesday.

That appellant could have done anything other than its agent did, suspend further purchases, to make the loss less, does not appear.

The judgment of the Circuit Court is reversed, and the cause remanded.

MR. JUSTICE WATERMAN UPON PETITION FOR REHEARING.

Counsel for appellee say that in the statement of facts preceding the opinion of this court, there is an erroneous statement, viz.: "That it was the habit of Kent to make proportionate daily purchases."

This statement is found in appellant's brief, of which counsel for appellee in their brief said: "The statement of the case in appellant's brief, although on the whole correct, is wanting in accuracy in one particular and in fullness." Counsel for appellee then go on to say that appellant's brief is inaccurate in declaring that Kent immediately sent to appellant notice that its telegram had not been received until after six car loads of hogs had been bought.

Counsel for appellee failed to call attention to any other inaccuracy.

Quite naturally, this court assumed that what counsel for each side declared to be a fact, was.

Turning to the record, we find that counsel for appellant asked Mr. Kent the following question:

"Q. When you got an order at the beginning of the week, similar to the one contained in the telegram just introduced in evidence, for instance, to buy ninety cars during the week, how did you make those purchases, all in one day, or how?"

To which counsel for appellee, Mr. Holt, said: "I object to that as immaterial and as not brought to the notice of the telegraph company, and therefore not binding upon it."

The objection being overruled, Mr. Kent answered: "A. I used my judgment in purchasing, depending upon the supply and market price. Some days would be heavier and some days would be lighter; but the general custom was to use my judgment during the week in making the purchases."

We think that the statement made by counsel for appellant and appellee, adopted by this court, and that made by the witness, are equally inconsequential. The important fact is, that owing to the negligence of appellee, Kent failed to receive an order not to buy, and consequently bought on August 1st at a higher price than he could have purchased on August 2d.

Appellee insists that Kent received the order not to buy at eight o'clock on Tuesday, and that his, Kent's, knowledge of the negligence was, at once, appellant's.

There is no testimony showing when the telegram not to buy was delivered to Kent, but it seems to be admitted that this was done at eight o'clock.

So too, counsel for appellee admitted that the statement of appellant as to the habit of Kent to make proportionate daily purchases, was correct, which admission they now retract.

Whatever may be the fact as to the time of the reception by Kent of this telegram, there is no evidence that Kent when he received the message knew that appellee had been negligent in its delivery.

The testimony is that the hogs were shipped upon a train leaving the Stock Yards at 12 o'clock. We know that six car loads of hogs must be delivered for shipment a considerable time before the train, upon which they are carried actually departs, and that from the time of delivery they are "in transit." That Kent could, at the time the telegram was received by him, by stopping the carriage, or in any other way, have lessened the loss attendant upon the negligence of appellee, does not appear.

We have been referred to no authority holding, as contended by appellee, that the reception by Kent, a mere agent to purchase, of the delayed telegram, was notice to appellant of the negligence of appellee; nor does it appear that if it were, appellant could have done anything to lessen the loss.

It is quite true that if appellant could, when it learned of the purchase, have at once sold the hogs in the Chicago

market, the difference between the purchase and the net price it could then have obtained, is the measure of damages, but there is no evidence that the hogs were at that time in a place where they could have then been sold in the Chicago or any other market.

The petition for rehearing is denied.

70	284
88	134

Charles Kotz v. City of Chicago and Illinois Central R. R. Co.

1. **REAL ESTATE**—*Damages Caused by Embankments.*—The building of an embankment by a railroad upon its own ground gives no right of action to persons whose property is injured thereby.

2. **STREETS**—*Liability for Changing Grades.*—Lowering the grade of a street is not *per se* a wrong, but if it be the cause of injury to private property, being done for public use, any damages allowed therefor must be paid by the public who use the street.

3. **PARTIES**—*Consequences of Misjoinder.*—A declaration in case against two defendants for what can be a cause of action against but one of them is demurrable.

Trespass on the Case, for injuries to real estate by the construction of an embankment, and the lowering of a street. Appeal from the Superior Court of Cook County; the Hon. WILLIAM G. EWING, Judge, presiding. Heard in this court at the March term, 1897. *Affirmed.* Opinion filed June 14, 1897.

WILLIAM E. HUGHES and SAMUEL M. BOOTH, attorneys for appellant.

C. V. GWIN, attorney for appellee, the Illinois Central Railroad Company; FRANK HAMLIN, attorney for appellee, the city of Chicago; JAMES FENTRESS, of counsel.

As to the allegations and averments in each of said additional counts in regard to the property of the plaintiff having been damaged by the elevation of the tracks and road-bed of the Illinois Central Railroad Company, it does not appear in and by the allegations and averments in either

Kotz v. City of Chicago & I. C. R. R. Co.

of said counts that any legal right of the plaintiff was thereby violated, impaired, or in anywise interfered with; nor does it appear that the said defendants or either of them thereby committed any breach of a legal duty or obligation due and owing by them or either of them to the plaintiff.

Because a railroad company has the same right as a private individual to erect proper structures for railroad uses on its own right of way. *Chicago & Western Indiana R. Co. v. Cogswell*, 44 Ill. App. 388; *Galt v. Chicago & North-Western R. Co.*, 157 Ill. 125; *Illinois Central R. Co. v. Chicago*, 156 Ill. 98; *Cassidy v. Old Colony R. Co.*, 141 Mass. 174; *New Orleans, B., etc., R. Co. v. Brown*, 1 So. Rep. 637; *Pennsylvania R. R. Co. v. Lippincott*, 116 Pa. 472; 30 A. & E. R. R. Cas. 399; *Hayden v. Skillings*, 29 A. & E. R. R. Cas. 316; *Pierce v. B. & L. R. Co.*, 27 A. & E. R. R. Cas. 363, and not 366; *Henry v. Dubuque, etc., R. Co.*, 2 Ia. 288, 301.

Because it does not appear from any fact stated in either count that any private right of the plaintiff was interfered with or violated by the elevation of the tracks and the building of the embankment, as would at common law entitle him to maintain an action for damages against a private individual building like structures on his own land for private use, nor does it appear from any fact stated that the plaintiff had or was entitled to enjoy any right of access to and from his lot or a right of passage, or easement of light, air or view over the right of way upon which the tracks and road-bed of the company were elevated and the embankment constructed. *Rigney v. City of Chicago*, 102 Ill. 64; *Caledonian R. Co. v. Ogilvy*, 2 Macq. H. L. C. 229; *Metro-politan Board of Works v. McCarthy*, L. R. 7 H. L. 243; C., M. & St. P. Ry. Co. v. Darke, 148 Ill. 226; *Barrows v. City of Sycamore*, 150 Ill. 588; *City of Chicago v. Bureky*, 158 Ill. 103; 1 Sedgwick on Damages (8 Ed.), 32; *Cooley on Torts*, p. 63; 1 Wood on Nuisances (3 Ed.), 57.

As to light and air, see *Keating v. Springer*, 146 Ill. 481; *Guest et al. v. Reynolds*, 68 Ill. 478; *Gerber v. Grabel*, 16 Ill. 217.

As to the allegations and averments in each of said counts averring damages to plaintiff's property by the depression of 60th street, it appears by said counts that the Illinois Central Railroad Company in depressing said street was acting in obedience to the lawful authority, command and direction, and as an agent of the city of Chicago in depressing said street, and that the public use for which it was depressed was for the use of a public street and not for the use of the Illinois Central Railroad Company, and the plaintiff has no right of action therefor against the defendant, the Illinois Central Railroad Company; wherefore the Illinois Central Railroad Company and the city of Chicago are improperly joined as parties defendant.

As to the allegations and averments in said counts averring damages to plaintiff's property by the elevation of the tracks and road-bed of the Illinois Central Railroad Company, it appears that the public use for which said tracks and road-bed were elevated were for the use of the Illinois Central Railroad Company, and not for the use of the city of Chicago as a municipality, and the plaintiff has no right of action therefor against the defendant, the city of Chicago; wherefore the Illinois Central Railroad Company and the city of Chicago are improperly joined as parties defendant. *Culbertson Packing Co. v. Chicago et al.*, 111 Ill. 651; *City of Olney v. Wharf*, 115 Ill. 519; *Tinker v. Rockford*, 137 Ill. 123; *Atchison, T. & S. F. R. Co. v. Lenz*, 35 Ill. App. 330; *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156; 31 N. E. 328; *Interstate Consolidated Rapid Transit Co. v. Early*, 46 Kan. 197; 26 Pac. 422; *Atchison, T. & S. F. R. Co. v. Arnold*, 52 Kan. 729; 35 Pac. 780; *Atchison, T. & S. F. R. Co. v. Luening*, 52 Kan. 732; 35 Pac. 801; *Webb's Pollock on Torts*, 154; *Geddis v. Proprietors of Bann Reservoir*, 3 App. Cas. 455; *Caledonia R. Co. v. Walker's Trustees*, 7 App. Cas. 293; *Mercy Docks Trustees v. Gibbs*, L. R. 1, H. L. 112; *Hammersmith R. Co. v. Brandt*, L. R. 4, H. L. 171; *Northern Transportation Co. v. Chicago*, 99 U. S. 635; *Broom's Legal Maxims*, 11, 12; 2 Wood on Nuisances (3d Ed.), 1018, Sec. 751; *Addison on Torts*, 738.

Under the Constitution of this State, where the legislature

has conferred the power of eminent domain upon a municipal or other corporate body to enable it to construct works for a particular public use, the grantee exercising such power and damaging private property by the construction of suitable works for the particular public use for which such grantee is authorized to construct such works, and thereby damage private property for the particular public use, is, in the absence of negligence in the construction of such works, alone liable to the owner for compensation for the property so damaged; and the agents, servants or employes of such grantee acting under its direction and personally engaged in making, building and adapting the requisite structures for the authorized public use, are not liable to such owner for damage to property resulting from such structures made by them in a reasonably skillful, prudent manner, free from negligence, and no action can be maintained by the owner of the property damaged against such persons as tortfeasors. *Brickett v. Haverhill Aqueduct Co.*, 142 Mass. 394; 8 N. E. Rep. 119; *Northern Transportation Co. v. Chicago*, 99 U. S. 635; *Benner v. Atlantic Dredging Co.*, 134 N. Y. 156; 31 N. E. Rep. 328; *Webb's Pollock on Torts*, 154, 155; 2 *Wood on Nuisances* (3d Ed.), 1018, Sec. 751.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Appellant owns a lot at the southwest corner of the intersection of Sixtieth street with the right of way of the Illinois Central Railroad, in Chicago. Before the track of the railroad was raised, over it from his lot he could receive the wholesome east wind from Lake Michigan, and view the beauties of Jackson Park. The track has been raised twenty feet and filled to that height, and the street in front of his lot cut down four feet; all to the injury of his lot in value, and obstruction of access to it.

For these misdeeds, committed jointly by them, he sued the city and the railroad, and they demurred.

The court sustained the demurrer, and final judgment was entered for the appellees.

Raising and filling the railroad track upon the railroad's own ground, gives the appellant no right of action against

anybody. C. & W. I. R. R. v. Cogswell, 44 Ill. App. 388.

If the lot of the appellant is damaged by cutting down the street, we will assume, but not decide, that he is entitled to recover the amount of that damage from the city but not from the railroad any more than he would be to so recover from the laborers who shoveled there.

The cutting down the street is not *per se* a wrong, but if the cause of injury to private property, though it be done for public use, the damage must be compensated by the public who use.

The declaration therefore is against two, partly for what is no cause of action against anybody, and partly for what can be a cause of action against but one of the defendants.

In such case the defendants may join in demurrer. 1 Ch. Pl. 97, Ed. 1883, and note 5.

The judgment is affirmed.

George W. Elder v. Simcoe Chapman.

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70 288
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1. REAL ESTATE—*When Party Agreeing to Convey Need Not Have Title.*—A person who has made a contract to convey land need not have title until it becomes his duty to convey, and all averments of defects in or want of title to the land before that duty arises, in pleadings in a suit concerning such contract are useless and of no effect.

2. REMEDIES—*On Agreements to Convey Real Estate.*—A contracted for the sale of certain land to B and received from B as a payment on the purchase under an agreement between B and C, a receipt for the commissions to be paid to C for effecting the sale. B sued to recover the amount of the receipt, claiming a cancellation of the agreement by A. *Held*, that as no money had been paid none could be recovered, and that the remedy was by suit for a breach of the agreement in which B should allege and prove his own ability and readiness to perform.

Assumpsit, to recover a partial payment on a purchase of land. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

FLOWER, SMITH & MUSGRAVE, attorneys for appellants.

Elder v. Chapman.

E. R. ELDRIDGE, W. T. ALDEN and H. S. DERBY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE FOLLOWING OPINION :

As said in appellant's brief: "The simple question involved in this record is whether or not the contract between the plaintiff and the defendant was void as a gambling contract, by virtue of the provisions for the distribution of the lots contained in the proposed syndicate agreement annexed thereto and made a part thereof."

The contract referred to recites the receipt by appellee from appellant of \$3,000, as part payment toward the purchase of blocks 5 and 6 of a certain subdivision of land (containing ninety-six lots), bargained by appellee to be sold to appellant for \$33,000, which said \$3,000 the declaration avers one "Robert S. Elder advanced and paid to the said Simcoe Chapman (appellee), for and on account of the plaintiff (appellant), * * * by way of commissions or services, or in some manner satisfactory to the said Chapman, which said \$3,000 said Simcoe Chapman in and by said last mentioned agreement duly acknowledged the receipt of from this plaintiff and for the payment of which to the said Robert S. Elder, he then and there became duly obligated to the said Robert S. Elder."

The contract further provided that appellant should act as trustee for as many shareholders as there were lots (96) in a syndicate to be formed for the purchase of the lots in accordance with the terms of a form of certificate to be given to each shareholder, thereto attached and made a part of the contract; and that appellee should accept notes and trust deeds made by future shareholders in the syndicate, in part payment of the said contract price, and the balance in cash upon the delivery of warranty deeds.

The form of certificate provided for, and made a part of the contract, first recites the receipt of fifty dollars from a person, whose name is left blank and is "called the subscriber," as the "first payment for one share of stock in the

syndicate formed for the purchase and development " of the said lots, and then proceed as follows:

"This receipt is given on the following conditions, which the said subscriber hereby accepts: The said fifty (\$50) dollars payment is made for the purpose of obtaining a contract with the owner of said premises by G. W. Elder, as trustee for the holders of this and ninety-five (95) other shares of stock in said syndicate. Each share is of the value of four hundred (\$400) dollars, and entitles the holder thereof to receive a good and sufficient warranty deed and a merchantable abstract to one lot in the subdivision of said premises, upon the fulfillment of each and every of the conditions herein specified.

Said subscriber agrees to further pay the sum of three hundred and fifty (\$350) dollars, less one ninety-sixth (1-96) part of the profits derived by sale of choice of lots as hereinafter provided, in the manner following: The sum of fifty (\$50) dollars when all of said shares are subscribed for, and the balance on delivery of warranty deed, or in substantially three equal payments, payable in one, two and three years after February 16, 1891. Said deferred payments to be secured by trust deed on the lot assigned and conveyed to said shareholder.

The assigning of lots shall be under the direction of a board of directors, who shall be elected by the shareholders. Each share shall constitute one vote, and may be voted by the holder of said share or his proxy.

Said directors shall notify each of said ninety-six (96) shareholders of the time and place for the assigning of said lots. Said notice to be deposited in the post office of the city of Chicago, with postage prepaid, at least five days before the date of the meeting for the assignment of said lots.

At said meeting bids will be received from said shareholders for choice of lots. The highest bidder, in every case, shall immediately select his choice of said lots. Bids will be received for choice of the lots remaining unselected, until there appears to be no further choice, when the remaining shareholders will draw by lot from the remaining unselected lots.

Elder v. Chapman.

Upon the selection of a lot by a shareholder, said shareholder shall immediately pay one-fourth of the amount he has bid for choice, in cash. The remaining three-fourths of said amount shall be paid in cash upon delivery of the warranty deed to the lot so selected by said shareholder, or may be divided into substantially three equal payments, consolidated with the deferred payments above mentioned, and all be secured as said deferred payments first above mentioned.

No one shall originally subscribe for more than five shares of stock in this syndicate, without the consent of the holders of two-thirds of the shares at that time subscribed for. Said subscribers shall receive a warranty deed to the lots selected by him upon the fulfillment of the conditions hereinbefore mentioned ten days after the assignment of said lots as aforesaid. On failure of said subscriber to fulfill each and every of the conditions hereinbefore mentioned at the time and in the manner herein mentioned (time being the essence of this certificate), this share of stock in said syndicate shall be forfeited.

..... [SEAL.]

Subscriber.

Residence.....

..... [SEAL.]

Trustee."

The record discloses a plat of said lots with a valuation of each lot marked thereon, ranging from \$350 to \$1,550, and also a bill rendered by R. S. Elder to the appellee bearing the same date as said contract, and receipted by said R. S. Elder as follows:

"Telephone 2879.

CHICAGO, February 16, 1891.

MR. SIMCOE CHAPMAN,

To R. S. ELDER, *Dr.*

Real Estate and Loans,

Room 10, 110 Dearborn street.

To commission on sale of blocks five (5) and six (6),

in North Chicago Lawn, to G. W. Elder.....\$3,000.

Received payment by contract to G. W. Elder of even date herewith.

R. S. ELDER."

The record also discloses a contract dated December 1, 1890, between the appellee and said R. S. Elder constituting the latter appellee's sole agent for the sale of said lots at the prices named in said plat, and providing for various other matters not pertinent to the issue raised by this appeal; and it also discloses a contract between the two Elders bearing the same date as that between the parties to this suit, concerning the same property and providing that R. S. Elder should make the advance payment on the said contract between appellee and appellant, and for a division between themselves of the profits to be realized out of the syndicate transaction, all of which may be said to be merely preliminary to and explanatory of the circumstances and surroundings attendant upon the making of the contract sued upon.

To the action, the appellant pleaded specially that the contract sued upon was made in pursuance of a corrupt and unlawful agreement to dispose of lots of land by lot and other unlawful agreements, by means whereof and by force of the statute, said contract was wholly void in law.

Upon the trial appellant, to maintain his action, offered in evidence the written agreement between himself and the appellee, and the other papers above referred to, and certain oral testimony by witnesses, to each and all of which the court sustained objections—holding that the contract sued on was forbidden by the statutes, under penalty, and therefore void.

The statute, Sec. 180 of the Criminal Code (Hurd's Ed. 1895), in force at the time the contract was made, and now, is as follows:

“Whoever sets up or promotes any lottery for money, or by way of lottery disposes of any property of value, real or personal, or under pretense of a sale, gift or delivery of any other property, or any right, privilege or thing whatever, disposes of, or offers or attempts to dispose of any real or personal property with intent to make the disposal of such real or personal property dependent upon or connected with any chance by dice, lot, numbers, game, haz-

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ard, or other gambling device, whereby such chance or device is made an additional inducement to the disposal or sale of said property * * * shall for each offense be fined not exceeding \$2,000."

The circuit judge, as shown by the record, appears to have relied upon the cases of *Dunn v. The People*, 40 Ill. 465; *Thomas v. The People*, 59 Ill. 160; *Lynch v. Rosenthal*, 144 Ind. 86 (42 N. E. R. 1103), and the applicability of the law of those cases to the facts of this record. See also *Seidenbender v. Charles*, 4 Serg. & Rawle, 151; *Fleming v. Bills*, 3 Oregon, 286.

The writer is inclined to the opinion that the scheme constituted a lottery within the inhibition of the statute, and therefore, although with serious misgivings, concurs in the reasoning and conclusion of the learned trial judge, and also concurs with Mr. Justice Gary, that the judgment should be affirmed for the additional reasons stated in his opinion.

The judgment will be affirmed.

MR. JUSTICE GARY.

I concur in affirming the judgment, but not because there is any lottery in the case. No distribution by lot could take place until all the lots for which any shareholders would give anything for a choice among them were disposed of; then the syndicate interest in the remaining lots, presumably of equal value, would belong to the non-bidding shareholders as tenants in common, and the distribution by lot would only turn an undivided interest in the whole into an exclusive interest in one.

So was the land of Canaan divided among the children of Israel (*Joshua*, Ch. 14, and following); and so sisters divided at common law. Co. Litt., Sec. 246.

My reason for affirming the judgment is that the appellant never performed his part of the contract.

His declaration avers that he sold fifty lots.

He had no lots to sell; only shares in the syndicate, and until he had sold ninety-six shares, and the lots were distributed, notes and trust deeds made, and, with the cash balance, offered to the appellee, he had nothing to do.

Whether he had good title before such offer was immaterial.

All averments in the declaration as to his want of title, or defects in it, are useless. He need not have title until it should become his duty to convey. *Foster v. Jared*, 12 Ill. 451; *Denby v. Graff*, 10 Ill. App. 195.

The declaration does not show that the appellant ever paid the appellee anything. It shows that the appellee acknowledged the receipt of \$3,000, not that he received it. The evidence shows that the \$3,000 was commission to Robert S. Elder for making the bargain for the appellee with the appellant, which receipt Robert S. gave to appellant to be used as a payment to the appellee, and that Robert S. was to have two-thirds of the profits the appellant might make.

Under such circumstances, if the appellee canceled the agreement with the appellant, as is alleged, the only action the appellant could have would be for damages for breach of the agreement—refusal to go on with and perform it. This action is not for such damages, but to recover the \$3,000 as if it were money had and received. The basis of the action is a fiction that the receipt represented money when there was no money.

In an action for breach of the agreement the appellant would be compelled to allege and prove his ability and readiness to perform on his own part.

Whether he could make such proof, this record does not show, but in it is a letter from the appellant indicating that he could not.

MR. JUSTICE WATERMAN.

I think that the contract is not unlawful.

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Jennie Crone v. Thomas W. Crone.

1. EVIDENCE—*Declarations of Payee of a Note as Against an Indorsee.*—A claimed to have been in partnership with B in the saloon business, and after B's death filed a bill against his wife, seeking to

Crone v. Crone.

establish such claim and to obtain a share of the proceeds of a sale of the saloon made by B during his last illness. The evidence showed that notes for which the saloon was sold were given to the wife, and that she claimed as an indorsee and not as an heir or purchaser. *Held*, that B's declarations as to the ownership of the saloon were admissible against her.

2. *SAME—Questions Calling for Conclusions Improper.*—The questions, "why was this \$1,000 to be paid to complainant;" and "why was complainant's name over the door of the saloon?" are improper, as they call for the conclusions of a witness.

3. *VARIANCES—In Equity.*—While the rule is that the allegations and proofs in proceedings in equity must correspond, relief will not be denied because of mere variance, unless the case stated and the case found are so materially variant as to prevent a decree in favor of the complainant.

Bill, for an accounting. Appeal from the Superior Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

CONSIDER H. WILLETT, attorney for appellant.

The allegations and proofs in chancery must correspond; and however clear the evidence may make a case for the complainant, unless in the bill there are averments of the shape made by the evidence, he can not have a decree. *Rowen v. Bowles*, 21 Ill. 17. He must stand or fall by the case made in his bill. *Gage v. Curtis*, 122 Ill. 520. He can not allege one case and recover by proof of another. *Trunkey v. Hedstrom*, 131 Ill. 209.

It is also the rule that all facts must be clearly and positively averred in (pleading *Primmer v. Patten*, 32 Ill. 531), and not by way of recital, and the right, title and interest of the complainant should be stated with accuracy, clearness and precision, and the proof must correspond with the allegations. *Put. Chan.* (4th Ed.), 46; *Fitzpatrick v. Beatty*, 1 Gilm. 454; *Morrison v. Smith*, 130 Ill. 304.

The rule that proofs without corresponding allegations are, in equity, as unavailing as allegations without proofs, is familiar to every lawyer. *Angelo v. Angelo*, 146 Ill. 633.

GEORGE B. POWER and ASA Q. REYNOLDS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

August 4, 1896, Walter S. Crone died in Chicago, leaving as his only heirs, appellant, his widow, appellee, his father, and Mrs. Knapp, his sister.

Walter Crone had been a saloon keeper. Appellee claimed to have furnished most of the capital therefor, and to have been a partner therein.

A bill was filed by appellee to establish such claim and obtain a share of the proceeds for which the saloon was by Walter sold during his last illness.

The declarations of Walter as to the ownership of the saloon were properly received.

Appellant was not a purchaser. The notes for which the saloon was sold were given to her, and she claimed as an indorsee, not as an heir of her husband.

Appellee filed a bill claiming that the transfer, gift, of the notes to appellant, was a fraudulent transfer, because the consideration of the notes belonged in part, only, to Walter, and he could not either keep or give away what belonged to his partner, appellee.

The declarations of Walter against his interest were admissible. Cowen and Hill's Notes to Phillips on Evidence, Vol. 1, pages 256-267.

The objections to the following questions asked of appellant by her counsel: "Why was this \$1,000 to be paid to complainant," "and why complainant's name was over the door of the saloon," were properly sustained. Each called for the conclusion of the witness.

While the rule is that the allegations and proofs in proceedings in chancery must correspond, relief will not be denied because of mere variance, unless the case stated and the case found are so materially variant as to prevent a decree in favor of the complainant. Lowenstein v. Rapp, 67 Ill. App. 678; Barton's Chancery Practice, 260.

We find in this case no variance so material as to require the setting aside of the decree rendered.

The evidence abundantly sustains the decree, and it is affirmed.

Lesser Franklin v. Hillsdale Land and Cattle Co. et al.

1. **VENDOR'S LIENS—General Principles—Waiver.**—The lien of a vendor of real estate upon the premises sold, in cases where the purchase money has not been paid and no security taken therefor, stands upon the equitable presumption that it was not intended by the parties that one should part with and the other acquire the premises without payment of the purchase price. The lien exists independent of contract and being secret in character is not favored and may be easily waived or lost.

2. **SAME—Taking Other Security Waives Lien.**—A vendor's lien rests upon the implied agreement between the vendor and the vendee that the vendor shall retain a lien upon the lands sold as security for the purchase money; and the fact the vendor has taken other security rebuts any such implied agreement and is a waiver of the lien.

3. **SAME—Waiver by Taking Other Security—The Rule Applied.**—Land was sold, security taken for part of the purchase price, and an agreement made that for the balance other property was to be taken in exchange. Such property was not delivered and the vendor filed a bill for a lien. *Held*, that the circumstances clearly rebutted any intention to rely upon an implied lien.

4. **SAME—Waiver by Conduct.**—A traded to B certain real estate upon which C held a mortgage, which he released in order that B might get a full and unincumbered title, such as A had contracted to deliver. B had notice that this was done and that a lien upon part of the property which he deeded to A in exchange for that received, was substituted for the lien which was released, yet he said nothing indicating an intention to claim a vendor's lien upon such property to secure the delivery of certain horses forming a further consideration for the trade. *Held*, that he was not entitled to a lien superior to the incumbrance in favor of C.

Bill, to foreclose a vendor's lien. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

J. T. BOOZ, attorney for appellant; F. M. BURWASH, of counsel.

The vendor's lien is recognized in this State. No agreement is necessary for its creation. It is presumed to exist until the contrary is shown and the burden of repelling this presumption is on the vendee. *Dyer v. Martin*, 4 Scam.

146; Trustees v. Wright, 11 Ill. 603; McLaurie v. Thomas, 39 Ill. 291; 28 Am. & Eng. Ency. of Law, 163.

It is a general rule in equity and it requires a very strong case to make an exception, that no man shall be compelled to part with his title till he receives the consideration; and so vigilant are the courts of equity to protect the seller that although an absolute conveyance be made, and no mortgage or other security taken, still in the hands of the vendee, or a subsequent purchaser with notice, the vendor has a lien on the land for his money. *Dyer v. Martin*, 4 Scam. 146.

As the vendor's lien is based upon the theory that it would be unconscionable that the vendee should hold the land and not pay for it, and as equity regards the substance rather than the form of contracts, it is immaterial, on principle, what shape the refusal or neglect may take. Unless the vendor has evinced an intention by the acceptance of other security, to release the vendee, it must be presumed that he holds the land in trust to pay what he has agreed as the purchase price, and in the case of conditions annexed to a grant and assumed by the vendee, if the performance of the conditions constituted an inducement to the sale, it is as much a part of the compensation to be paid as if the promise had been to pay the vendor as part of the purchase money, a sum equal in amount to the damages sustained by their breach; and the equitable lien will, it is held, attach to the land sold, as well for such damages as for the purchase money. *Warvelle on Vendors*, page 707; *Dayton, etc., Ry. Co. v. Lewton*, 20 Ohio St. 401; *Bennett v. Shipley*, 82 Mo. 448; *Elliott v. Plattor*, 1 N. E. Rep. 222.

The lien may be enforced although the price was to be paid in specific articles. *Harvey v. Kelly*, 41 Miss. 490; *Winters v. Fain*, 47 Ark. 490.

So long as the debt exists courts will not presume that it (the lien) has been surrendered without satisfaction, unless upon clear and convincing testimony. The burden of proof of a waiver rests upon the party alleging it, and as such waiver is largely a matter of intention, if it be doubtful

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from all the facts and circumstances, the lien will be presumed to be still in force. *Cole v. Withers*, 33 Gratt. (Va.), 186; *Wilson v. Lyon*, 51 Ill. 166.

“Generally speaking, the lien of the vendor exists, and the burden of proof is on the purchaser to establish, that in the particular case, it has been intentionally displaced, or waived by consent of the parties.”

“The taking of a security for the payment of the purchase money, is not, of itself, as it was in the Roman law, a positive waiver or extinguishment of the lien.” *Story’s Equity Jurisprudence*, Sec. 1224 and 1226; *Mackreth v. Symmons*, 15 Ves. 342, 349; *Nairn v. Prowse*, 6 Ves. 759, 760; *Garson v. Green*, 1 John. Ch. 308; 4 *Kent. Com. Lect.* 58, p. 152, 153; *Lewis v. Caperton*, 8 Gratt. 148; *Plowman v. Riddle*, 14 Ala. 169.

WILSON, MOORE & McILVAINE, attorneys for appellees.

The implied vendor’s lien is a secret incumbrance, which is not looked upon with favor by the courts of this State.

These secret liens on real estate, because generally in point of fact, however it may be in legal contemplation, unknown to the parties to be affected by them, are often productive of much injustice, and ought not to be encouraged. The whole doctrine of implied liens is of very questionable policy. As respects third persons, it ought not in anywise to be extended or enlarged. *Trustees of School v. Wright*, 11 Ill. 603.

This species of incumbrance upon real estate has never been looked on with favor in this State. We ought not, therefore, to extend this lien beyond the requirements of the settled principles of equity law. Whenever, from any circumstance, the court can infer that the vendor did not rely upon this lien for his security the courts have treated it as waived. *Richards v. Leaming*, 27 Ill. 431; *Cowl v. Varnum*, 37 Ill. 181; *Boynton v. Champlin*, 42 Ill. 57; *Doolittle v. Jenkins*, 55 Ill. 400; *Kirkham v. Boston*, 67 Ill. 599; *Mo-shier v. Meek*, 80 Ill. 80; *Mitchel v. Shaneberg*, 149 Ill. 420.

The main principle that governs courts of equity in

enforcing the vendor's lien is the implied agreement existing between the vendor and the vendee, that the former shall hold a lien on the lands sold for the payment of the purchase money. When, therefore, it appears that the vendor did not rely on the lien, this does away with that implied agreement, and courts hold the lien waived. *Kirkham v. Boston*, 67 Ill. 599 (603).

A vendor's lien is not recognized by our statute and is entirely unknown to the common law, but has been engrafted upon the equity jurisprudence of England from the civil law. It is based upon the implied agreement between the vendor and the vendee that the former shall hold a lien on the lands sold for the payment of the purchase money. Accordingly, where the vendor, parting with the legal estate, takes security other than the personal liability of the purchaser for the payment of the purchase money, he thereby waives his lien. *Baker v. Updike*, 155 Ill. 54.

The decisions of the other courts of the United States hold the same doctrine, that the taking of security upon the land sold, or part of it, is inconsistent with the vendor's lien, and is a waiver thereof. *Avery v. Clark*, 87 Cal. 619; *Baum v. Grigsby*, 21 Cal. 172; *Dudley v. Dickson*, 14 N. J. Eq. 252; *Hadley v. Pickett*, 25 Ind. 450; *Richards v. McPherson*, 74 Ind. 158; *Porter v. The City of Dubuque*, 20 Ia. 440; *Stewart v. Harrison*, 52 Ia. 511; *Gaylord v. Knapp*, 15 Hun, 87; *Carrico v. Farmers & Merchants National Bank*, 33 Md. 235; *Briscoe v. Callahan*, 77 Mo. 134; *Orrick v. Durham*, 79 Mo. 174; *Perry on Trusts*, Section 237; 3 *Pomeroy's Eq. Jur.*, Sec. 1252; 2 *Jones on Liens*, Sec. 1080.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a decree dismissing the amended and supplemental bill of the appellant for want of equity, and granting the relief prayed by the cross-bill of certain of the appellees.

As the result of certain contracts entered into between the appellee, Hillsdale Land and Cattle Company, of Cheyenne,

Wyoming, and the appellant, Lesser Franklin, of Cook county, the appellant conveyed to the Land and Cattle Company, seven hundred lots in a subdivision known as Franklin Park, in the county of Cook. And it was agreed that for said lots the Land and Cattle Company should convey to appellant, free of incumbrance, twelve hundred acres part and parcel of a certain ranch in Wyoming, and deliver upon said ranch a number of cattle and horses, and assign to appellant certain land grant contracts, and pay \$75,000 in money, payable in ten equal annual payments secured by mortgage back to appellant on five hundred of the seven hundred lots.

Pending the closing of the contract it developed that the ranch was incumbered by trust deed to Truman B. Hicks, securing an indebtedness of about \$70,000, owed by the Land and Cattle Company to the First National Bank of Cheyenne and one Van Tassell.

To free the ranch from such incumbrances, it was arranged between the Land and Cattle Company and said bank and Van Tassel, that a trust deed by the Land and Cattle Company to Hicks upon the whole seven hundred lots should be substituted for the trust deeds upon the ranch, to secure practically the same indebtedness, and such arrangement was carried out, and the trust deed to Hicks upon the seven hundred lots was delivered and recorded at the same time that the other papers were exchanged and recorded. The trust deed to secure the \$75,000, part purchase money, was a first lien upon said five hundred lots, and the trust deed to Hicks was a second lien upon them and a first lien upon the remaining two hundred lots.

There was afterward a failure by the Land and Cattle Company to deliver some of the cattle and horses contracted for to the extent or value, as claimed, of \$24,400; and appellant's bill was filed to foreclose a vendor's lien for that amount as being unpaid purchase money for the two hundred lots which were not included in the trust deed to secure the \$75,000, but were covered by the trust deed to Hicks, to secure the bank and Van Tassell to the extent of their former and released lien upon the ranch.

The cross-bill was filed by Hicks, the bank and Van Tassell, to foreclose the trust deed to Hicks upon the same two hundred lots—the first trust deed upon the 500 other lots having been already foreclosed, as stated in the decree at bar.

There are numerous reasons why the Circuit Court rightly dismissed the appellant's bill.

The lien of a vendor of real estate upon the premises sold, in cases where the purchase money has not been paid and no security taken therefor, stands upon the equitable presumption that it was not intended by the parties that one should part with and the other acquire the premises without payment of the purchase price. And the lien exists independent of contract, and being secret in character is not favored, and may be easily waived or lost.

All authorities hold that if the vendor takes security he waives his lien. And this is so, because the lien rests upon the implied agreement between the vendor and the vendee that the vendor shall retain a lien upon the lands sold as security for the purchase money, and the fact that the vendor has taken other security, rebuts any such implied agreement.

The authorities in this State and elsewhere are numerous, and without amplification we will merely cite a few of them: *Conover v. Warren*, 1 Gil. 498; *Trustees v. Wright*, 11 Ill. 603; *Richards v. Leaming*, 27 Ill. 431; *Burger v. Potter*, 32 Ill. 66; *Kirkham v. Boston*, 67 Ill. 599; *Lehndorf v. Cope*, 122 Ill. 317; *Baker v. Updike*, 155 Ill. 54; *Brown v. Gilman*, 4 Wheaton, 255; *Fish v. Howland*, 1 Paige Ch. 20; 2 Sugden on Vendors, 384, 385 (8th Am. Ed., notes by Perkins).

The contract at bar was an entire one, and did not, as is contended, separate the two hundred lots from the entire seven hundred. It expressly provided for security being given for \$75,000, part of the purchase price of the whole number of lots. For the balance of the purchase price other property was to be taken, as in exchange, clearly rebutting any intention to rely upon an implied lien for it.

The authorities we have cited show that no lien can be

Lane v. Frake.

retained under such circumstances. The parties, by their contract, plainly did not contemplate the reservation of a lien by Franklin, and equity will not create one where it is manifest from the contract none was intended by either party.

But upon another ground, no lien should be allowed to appellant, as against the cross-complainants, the bank and Van Tassell.

They released their security upon the ranch in order that appellant might get a free and unincumbered title thereto, under his contract with the Land and Cattle Company to have such. The appellant stood by and had notice that this was done, and a lien upon the 200 lots substituted for that which they released, and which he got the benefit of. By his supplemental agreement with the Land and Cattle Company, he gave time until a date nearly three months after all transactions in connection with the transfer and mortgaging of the real estate took place, for the Land and Cattle Company to deliver other horses, to take the place of cattle and horses originally contracted to be delivered, and said no word indicative of a retention by him of a vendor's lien upon the lots which the cross-complainants, with notice to him, were taking a mortgage upon.

He was then satisfied to take the unsecured agreement of the Land and Cattle Company to deliver the horses to him, and he should not now be heard in equity to deny the priorities over him of the cross-complainants.

We omit discussion of the element of fraud that is argued, for the reason we discover no sufficient evidence to support the argument.

The decree was right, and is affirmed.

James R. Lane v. James Frake.

1. *DEBT—to Recover a Penalty Not Quasi Criminal in its Nature.*
—An action of debt to recover the penalty provided for by Sec. 10, Chap. 95, R. S., is not within the meaning of the Constitution of this State a criminal or quasi criminal case.

2. MORTGAGES—*Failure to Release*—Sec. 10, Chap. 95, R. S., *Construed*.—A mortgagee is not required by Sec. 10, Chap 95, R. S., to determine disputed questions and is not liable under that section for a failure or refusal to release a mortgage where the right of the person demanding such release is a disputed question.

Debt, for a penalty. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

Appellant caused certain undivided premises to be conveyed to one Herbert L. Bailey, by deeds dated June 4, 1891, upon which premises Bailey executed a trust deed to appellee, to secure the payment of the balance of the purchase price of said premises, evidenced by notes due respectively in one, two and three years after date. Appellant paid the cash payment made at the time of the conveyance to Bailey, and also paid in August, 1892, the notes that fell due in June of that year.

Bailey conveyed the premises to one Church. Church subdivided the premises and conveyed them to appellant, who conveyed them to A. J. Vesey, who executed a trust deed to one Fishburn, trustee, on a part of the premises. All of these deeds and plat were filed for record the same day, October 20, 1893. In April, 1894, Vesey conveyed all the premises to Andrew A. Brock, subject to all the incumbrances then on the premises.

On June 20, 1894, a bill was filed to foreclose the Bailey trust deed, for the non-payment of the taxes of the years 1892 and 1893, and the non-payment of the notes falling due June 4, 1893 and 1894. The trust deed to appellee provided that upon payment of a specified sum, the trustee should release a certain proportion of the property. Such payment having been made, July 17th, 19th and 20th, appellant demanded that appellee release a part of the premises described in the Bailey trust deed. The trustee refused to execute the release demanded. August 8th, Lane filed his cross-bill to obtain a release of the lots he had demanded Frake to release. On August 20th, Lane brought suit in

debt by ordinary summons to recover the penalty provided for by Sec. 10, Chap. 95, Revised Statutes. Judgment by default was rendered against Frake (appellee) for \$150, who appealed to the Circuit Court of Cook County. On trial in the Circuit Court judgment was rendered for appellee.

Appellant contends that the appeal in this case should have been taken to the Criminal Court, and in consequence of its being taken to the Circuit Court, that Court should have dismissed the appeal on his motion.

This contention is based on Sec. 26, Art. 6, Constitution of 1870, a part of which section reads: "All recognizances and appeals taken in said county in criminal and quasi criminal cases shall be returned and taken to said (Criminal) Court."

Appellant asserts that this case, commenced before a justice, is a quasi criminal case.

THOMPSON, DELAMATER & CLARK and WILLIAM H. WILKINS, attorneys for appellant.

Civil cases are of two kinds, those purely civil and those quasi criminal. A quasi criminal case is not a criminal case but is a civil case, somewhat resembling in its nature a criminal case. That a quasi criminal offense is not a criminal offense as defined by the criminal code is, under the authorities, clear. *Wiggins v. City*, 68 Ill. 375; *Tully v. Northfield*, 6 Ill. App. 358.

Cases of this character to recover a penalty, are quasi criminal in nature, and that an appeal under the Constitution clearly lies to the Criminal Court of Cook County. The Criminal Court of Cook County, under the present Constitution has jurisdiction in cases of quasi criminal nature. These terms as used, are intended to embrace all offenses, not crimes or misdemeanors, but in the nature of crimes, which should be punished not by indictment, but by forfeitures and penalties. It includes all *qui tam* actions, prosecutions for bastardy, informations in the nature of quo warranto, and suits for the violation of ordinances. *Wiggins v. City*, 68 Ill. 375.

Actions to recover statutory penalties are in their nature quasi criminal prosecutions. *Tully v. Northfield*, 6 Ill. App. 359; *Chicago, R. I. & P. Ry. Co. v. Calumet*, 50 Ill. App. 555.

CHAS. S. CUTTING, attorney for appellee.

The appeal was properly taken to the Circuit Court, as this cause is not a criminal or quasi criminal case. *Webster v. The People*, 14 Ill. 365; *Wiggins v. City of Chicago*, 68 Ill. 372.

Our Supreme Court has frequently decided that where an ordinance does not inflict a fine for its violation, but in terms imposed a penalty, the suit to recover the penalty is a civil suit, and an action of debt is purely a civil action. *Town of Lewiston v. Proctor*, 27 Ill. 414; *Town of Havana v. Biggs*, 58 Ill. 483; *Town of Pardridge v. Snyder*, 78 Ill. 519; *City of Chicago v. Enright*, 27 Ill. App. 568; *Knowles v. Village of Wayne City*, 31 Ill. App. 475.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The appeal was properly taken to the Circuit Court. The cause is not, within the meaning of the Constitution of this State, a criminal or quasi criminal case. *Webster v. The People*, 14 Ill. 365; *Wiggins v. City of Chicago*, 68 Ill. 372; *City of Chicago v. Enright*, 27 Ill. App. 559.

This court does not affirm judgments because of a failure on the part of appellees to file briefs.

The statute under which this action is brought is as follows:

"If any mortgagee or trustee in a deed in the nature of a mortgage * * * knowing the same to be paid, shall not, within one month after the payment of the debt secured by such mortgage or trust deed and request and tender of his reasonable charges, release the same, he shall, for every such offense, forfeit and pay to the party aggrieved the sum," etc. Illinois Revised Statutes, Chap. 95, Sec. 10.

The statute, being penal, is to be strictly construed.

Lewinsohn v. Stevens.

Appellant, when he demanded the release, was not the owner of the premises which he sought to have released, nor had the entire mortgage debt been paid.

The contention of appellant is that the trustee should have determined that he, Lane, was entitled to have a release of a portion of the mortgaged property, and that the portion selected by appellant was such portion, both of which were disputed questions, about which courts have held variant opinions. Appellant contends that for not having decided such questions correctly the trustee must pay a penalty of \$150.

The judgment of the Circuit Court is affirmed.

Dave Lewinsohn v. Charles A. Stevens et al.

70	307
78	552
78	555

1. *PRACTICE—Objections Should be Specific.*—To constitute error in their overruling objections must be specific and direct the court's attention to the very point, to the end that an opportunity may be had to obviate them and avoid error.

2. *SAME—Objections Should be Specific—The Rule Applied.*—The question, "What was the amount of the account which you presented to the defendant for payment," was objected to on the ground that it was not the best evidence. *Held*, that the objection should have stated that such evidence was not the best evidence because it called for the contents of a writing shown to have once existed and which remained unaccounted for.

3. *SAME—Application of Technical Rules.*—A technical answer to a technical claim is good and where a party stands upon and demands the application of strict rules of law in his own favor equal strictness will be observed in enforcing rules which operate against him.

4. *APPELLATE COURT PRACTICE—What Abstracts Should Show.*—Where an abstract states "Motion for new trial * * * motion denied, exception by defendant," without showing by whom the motion was made, what motion was denied or to what ruling of the court exception was taken, the court will not undertake to supply the omission.

Assumpsit, for the price of goods sold and delivered. Appeal from the Circuit Court of Cook County; the Hon. RICHARD S. TUTHILL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

MAHER & GILBERT and ROBERT F. KOLB, attorneys for appellant.

HOYNE, FOLLANSBEE & O'CONNOR, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellees sued the appellant for goods, wares and merchandise sold and delivered, and upon an account stated, and filed with their declaration an affidavit of amount due, \$384.84.

The appellant pleaded the general issue, but did not file an affidavit of merits, nor did he offer any evidence at the trial.

The only evidence in the case was the testimony of a witness for the appellees, who was their collector, that on numerous occasions, as many as twenty times, he called at appellant's place of business to collect an account for a lot of silks and draping materials sold and delivered to the appellant by appellees, but was put off with promises; that he presented to appellant the statement of the account; that the amount of the account so presented was \$584.84, on which \$200 was paid, but that he did not know whether at any of the times when he saw appellant any specific sum of money, as due and owing, was mentioned between them.

The witness was unable to identify the statement of account that was exhibited to him when testifying, any more definitely than to say it was either the original statement presented to the appellant by him, or an exact copy of it, whereupon such statement, upon the objection of appellant, was refused to be admitted in evidence.

No other evidence being introduced by either party, the court instructed the jury to find a verdict for the appellees for the balance of \$384.84.

All of appellant's contentions hinge upon a question put to the witness by appellees' counsel, over appellant's objection that it was not the best evidence, as follows:

"What was the amount of this account which you presented to the defendant for payment?"

That question was put and answered after the court had refused to admit in evidence the statement that the witness had failed to certainly identify as the one presented.

We have sometimes said in cases that have appeared to be wholly based upon technicalities, that "a technical answer to a technical claim is good." *Flaningham v. Hogue*, 59 Ill. App. 315.

And that we do no injustice to appellant in speaking of his defense as a purely technical one, is apparent, not alone from the record made in the trial court, but also from the closing sentence of his reply brief here, where he says: "The appellant stands, as he has a right to do, on his strict legal rights, and respectfully asks of this court a reversal of the judgment below."

The objection to the question, that it was "not the best evidence," did not include in it, as in absolute legal strictness it should have done, the reason that it was not so because it called for the contents of a writing shown to have once existed, and which remained unaccounted for. Had the reason been stated, the objection might have been then and there cured by better evidence. The rule requires that, to constitute error in their overruling, objections must be specific, and direct the court's attention to the very point, to the end that an opportunity may be had to obviate them and avoid error. For aught that appears, it was because of lack of such specificness at the trial where the objection might have been avoided, that the court afterward refused to set aside the verdict, and if so, it did right. *C. & E. I. R. R. Co. v. Holland*, 122 Ill. 461; *James v. Dexter*, 113 Ill. p. 656.

Again, the abstract shows: "And thereupon the court peremptorily instructed the jury to find a verdict for the plaintiff for the sum of \$384.84.

(Exception by the defendant.)"

What was excepted to? The "exception" does not state. And again, the abstract shows:

"Motion for new trial in writing." By whom was the motion made? The abstract does not state. And follow-

ing the assigned grounds for a new trial, the abstract shows:

"Motion denied. Exception by defendant."

What "motion" was denied? The abstract does not state. To what ruling of the court was the "exception" taken? The abstract does not state. *Schanzenbach v. Brough*, 58 Ill. App. 526; *Baker v. Newbury*, 63 Ill. App. 405; *Gibler v. City of Mattoon*, 167 Ill. 18.

Probably, we might infer with reasonable accuracy what is meant, but abstracts which are presumed to present everything upon which the party appealing relies, may not leave to inference that which certainty demands should be expressed.

Other imperfections in the abstract might be pointed out, but such as have been mentioned are in connection with the vital points of the case. If no motion by appellant for a new trial were made, or if made by him the court overruled the same, and he did not take an exception to that action by the court, the appellant can not complain upon appeal.

This is the rigorous application of strict rules of law, as we said in the *Flaningham* case, *supra*, but the appellant says he stands upon such and demands their application in his favor. If they have discomfitted him in his endeavor to get rid of a judgment which he has nowhere so much as attempted to deny the righteousness of, he ought not to complain.

The judgment of the Circuit Court is affirmed.

**Emil Calman, Gustav B. Calman and Charles Calman v.
Henry Stuckart.**

1. *EQUITY—Relief Against Judgments.*—The failure of persons agreeing to defend a suit to keep their agreement gives rise to no equity in favor of the defendant in such suit, the neglect of such persons is the neglect of the defendant, and a court of equity will not interfere with the collection of a judgment against him.

2. *SAME—Power Over Erroneous Judgments.*—A court of equity will

Calman v. Stuckart.

not set aside an erroneous judgment which is not void. It is not the business of a court of equity to correct errors of courts of law.

8. **FRAUD—How Shown.**—Fraud must be shown by the allegation of facts from which it is a necessary or probable inference; it can not be made out by the profuse use of adjectives, characterizing acts alleged to have been done, as fraudulently done.

Bill, to enjoin the collection of a judgment. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded with directions. Mr. Justice WATERMAN dissenting. Opinion filed June 14, 1897.

WOLSELEY & HEATH, attorneys for appellants.

Before a bill can be maintained to set aside a judgment to which there was a good defense at law, known to the defendant at the time it was rendered, it must clearly appear that the enforcement of the judgment would be unjust and against conscience, and moreover, that the defendant was prevented from making his defense to the action in which the judgment was obtained by fraud, mistake, accident or surprise without *laches*, negligence or default on his part or those representing him. Clark v. Ewing et al., 93 Ill. 572; Bay et al. v. Cook, 31 Ill. 336; Vennum v. Davis et al., 35 Ill. 568; Kern v. Strausberger et al., 71 Ill. 413; Allen v. Smith et al., 72 Ill. 331; Weaver v. Poyer et al., 70 Ill. 567; Smith et al. v. Powell et al., 50 Ill. 21; Walker v. Shreve et al., 87 Ill. 474.

GOLDZIEB & RODGERS, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee filed this bill in chancery, from which it appears that January 2, 1896, he was summoned as a garnishee in a suit by attachment commenced by the appellants against one Pohle, to whom he owed \$28. December 28, 1895, the appellee had been notified by Wolf, of the firm of O'Connor & Wolf, attorneys, that Wolf had purchased the claim of Pohle against the appellee.

Soon after he was summoned, the appellee received a

letter from the attorneys that they would defend him without expense to him. He answered that he was ready to pay the amount he owed when the court should decide to whom, and rested in the belief that the attorneys would take care of him.

March 24, 1896, he was served with a *sci. fa.* on a conditional judgment entered against him March 5, 1896, for \$375.30, but he still rested in the belief that the attorneys would take care of him. April 18, 1896, the conditional judgment was made absolute, and June 1, 1896, an execution issued thereon, which the sheriff was about, at the time the bill was filed, to levy upon the property of the appellee.

The facts already stated present no excuse for the neglect of the appellee to attend to the process against him. If the relation of attorney and client was created between O'Connor & Wolf and the appellee, their neglect was his neglect. *Clark v. Ewing*, 93 Ill. 572.

If such relation was not created, but only some sort of contract made between him and them, their failure to perform it gave rise to no equity against the appellants.

Having notice March 24, 1896, that a conditional judgment had been entered against him for more than a dozen times as much as he owed, his trust in the diligence of the attorneys to take care of him, was wholly unwarranted, and his own inattention to his interest was great negligence. *Mellendy v. Austin*, 69 Ill. 15.

An amendment of the bill states that the wrong done to the appellee "was the result of a fraudulent collusion between Wolf and the appellants" for the benefit of Wolf, and describes how he obtained the benefit; and both the original bill and amendment state divers irregularities in the proceedings by which the judgment was obtained.

Such irregularities give the appellee no standing in equity. *Gibbons v. Bressler*, 61 Ill. 110. If they were such as to affect the jurisdiction of the court, he had his remedy by writ of error. *Dennison v. Taylor*, 142 Ill. 45; *Dennison v. Blumenthal*, 37 Ill. App. 385.

As to the charge of fraudulent collusion, no facts are

 Washington Ice Co. v. Bradley.

alleged. "Fraud must be shown by the allegation of facts from which it is the necessary or probable inference. Fraud can not be made out by the profuse interpolation of adjectives, characterizing acts alleged to be done as fraudulently done." *Fowler v. Loomis*, 37 Ill. App. 363.

A demurrer to the bill was overruled and a decree entered that the appellee pay the appellants \$28, and they enjoined from enforcing the judgment.

This is error. The decree is reversed and the cause remanded, with directions to the Superior Court to dissolve the injunction and dismiss the bill at the costs of the appellee. Reversed and remanded with directions.

MR. JUSTICE WATERMAN dissents.

 Washington Ice Co. v. Frank E. Bradley, Adm'r, etc.

1. VERDICTS—*Upon Conflicting Evidence.*—Under the law it is the province of a jury to determine questions of fact upon conflicting evidence, and there being positive evidence tending to support the allegations of the declaration in this case, the verdict must stand.

2. INSTRUCTIONS—*As to Issues not Raised by the Pleadings nor Following from the Evidence.*—The trial court refused to charge the jury, "that if you believe from the evidence that the defendant's ice wagon did not run over the deceased, you will find the defendant not guilty * * * ." Held, that the instruction was properly refused, as it presented to the jury an issue not raised by the pleadings, and not necessarily following from the evidence.

3. EVIDENCE—*Admission of, in Rebuttal Rests in the Discretion of the Trial Judge.*—The admission of evidence in rebuttal is always a matter resting in the discretion of the trial judge, and is not subject to review except in cases of gross abuse.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

This was an action brought by appellee as administrator of the estate of Mary Moriarity, deceased, to recover damages resulting from the death of said deceased, caused, it

was alleged, by injuries received from one of the appellant's ice wagons in the month of November, 1893.

On November 11, 1893, the servants of the ice company delivering ice in the neighborhood of Cottage Grove avenue and 32d street, in the city of Chicago, left the team headed north in front of No. 3210 Cottage Grove avenue and carried ice into a saloon at that number, leaving the horses unhitched. There was a city ordinance then in force prohibiting the leaving of horses attached to wagons in any street of the city "without securely fastening" such horses. The ordinance did not undertake to define the meaning of the words used, or say what should constitute a secure fastening. Another section, however, provided that the owners of each building in front of which there should be any sidewalk should provide and securely fasten in the sidewalk an iron ring of a specified diameter and thickness, or erect a suitable post for hitching, in every twenty-five feet of such sidewalk.

There were no iron rings or posts in the sidewalk at or near the point where the team was left, or between it and the corner. On leaving the wagon, there being no rings or hitching posts in sight, the driver and his helper hooked up the lines to two rings in the back of the wagon so as to keep the horses from going ahead. When lines are hooked up in this way the horses can pull the wagon only by the reins. This was the customary way of hooking them up and was the only means provided by the ice company for "securely fastening" the horses. During the few minutes while the men were delivering the ice at number 3210, the horses started up and went north on Cottage Grove avenue, turning west at the corner on 32d street. The deceased had crossed 32d street and was about to step onto the sidewalk at the corner, when, as is claimed by appellee but denied by appellant, she was struck by the team and injured. She died the same day. She was between forty-four and forty-five years of age, and left a husband, but no children, surviving her.

ULLMANN & HACKER, attorneys for appellant.

Washington Ice Co. v. Bradley.

WM. ELMORE FOSTER, attorney for appellee.

The admission or exclusion of evidence not strictly in rebuttal is a matter resting in the discretion of the trial court, the exercise of which discretion is not subject to review except in cases of gross abuse.

Thompson on Trials, Sec 346, p. 309, citing among others: Farmers' M. F. Ins. Co. v. Bair, 87 Pa. St. 124; Marshall v. Davies, 78 N. Y. 414; Huntsman v. Nichols, 116 Mass. 521; Dozier v. Jerman, 30 Mo. 216; Walker v. Walker, 14 Ga. 242.

The general rule is that, after the evidence of the defendant is closed, the plaintiff will be confined to rebutting evidence and will not be allowed to produce original or direct evidence on his part; but the rule is not inflexible and the court may, in its discretion, allow or refuse to receive such evidence. McGowan v. C. & N. W. Ry. Co., 64 N. W. Rep. 893; Abbott's Trial Brief, 42; Thomp. Trials, Secs. 346, 348; Winchell v. Winchell, 100 N. Y. 159; Ankersmit v. Tuch, 114 N. Y. 54.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

In an action brought by the administrator of the estate of the deceased woman, to recover damages for her death, a verdict and judgment for \$5,000 was recovered.

Upon this appeal no question is made as to the damages being excessive. The only errors that are argued, are that the verdict was against the weight of the evidence; that a certain instruction asked by appellant was refused, and that rebuttal evidence was allowed as to marks upon the body of the deceased.

We can not, with due regard to the law that it is the province of a jury to determine questions of fact upon conflicting evidence, yield to the plausible argument of appellant's counsel that the woman's death was due to natural causes, and not to the application of force, as charged in the declaration. We might conjecture that her death was the result of some sudden attack with which appellant had nothing to do, but it would be mere surmise, and there being

positive evidence tending to support the action as alleged, we should not interfere with the verdict. The circumstance that the witnesses for appellee varied in their versions of the occurrence tends to corroborate their truthfulness, rather than to discredit them.

It is common observation that eye witnesses to the whole or a part of an incident that occurs unexpectedly and is in a considerable degree horrifying in its nature, testify to or otherwise relate what they saw, at considerable variance with one another. And yet it has never been held that because they did so, they were unreliable or partial persons.

The second argued error is, that the court refused to charge the jury, "that if they believe from the evidence that the defendant's ice wagon did not run over the deceased, they will find the defendant not guilty, and in this connection they are also instructed that the burden of proof is upon the plaintiff to show by a preponderance of evidence that her death was the result of injuries caused by her being run over by the defendant's wagon."

The instruction was properly refused. It presented to the jury an issue not raised by the pleadings, and not necessarily following from the evidence.

There does not appear to have been, either in the original or amended declaration, any count that the wagon ran over the deceased.

The first one of the two original counts, abstracted by appellee charged that: "The said horses, hauling the said wagon, as aforesaid * * * struck with great force and violence * * * upon and against the said Mary Moriarity," etc.

And the second charged that: "Said horses, attached to said wagon * * * struck upon and against the said Mary Moriarity," etc.

The amended declaration, as abstracted by appellant, charged that: "The horses * * * started up, and said wagon struck upon and against the said Mary Moriarity," etc.

But such do not amount to a charge that she was run over by the wagon.

There was evidence tending to show that the deceased was first struck by the horses, and that while in a stooping position from such collision, she was struck by a portion of the front wheel of the wagon, and knocked down and run over.

The counts of the declaration not alleging that the wagon ran over the deceased, it was not necessary to a recovery to prove that it did, nor was it necessary that the jury should look only to the evidence that it did do so, in order to determine whether the appellant was guilty as charged in the declaration.

It was enough if the jury believed, from all the evidence, that the woman's death was the result of being struck by either the horses or the wagon. One of appellant's witnesses testified that when he first looked, after hearing her scream, her leg was in a hole in the pavement between the team and the sidewalk, about midway between the front and hind wheel of the wagon, and that the wagon did not run over her. The clear inference from that testimony is that before the witness saw the woman the horses and front part of the wagon had passed her, and it was left to the jury, if they so believed, from all the evidence, including the appearance of the dead woman's body, to find that she had been struck by either the horses or the front wheel, and not run over by the wagon. They were at liberty to find from a part of the evidence that the deceased was struck by either the horses or the wagon, and from other evidence that she was not run over, and that her death was occasioned as charged.

The third and last argued error is the admission of evidence in rebuttal that was properly a part of the main case. The admission of evidence in rebuttal is always a matter resting in the discretion of the trial judge, and is not subject to review except in cases of gross abuse. Thompson on Trials, Sec. 346; McGowan v. C. & N. W. Ry. Co., 91 Wis. 147. The judgment will be affirmed.

70	315
173	13

James Conlan v. Maurice A. Mead et al.

1. VERDICTS—*Upon Conflicting Evidence and Not Warranted by the Evidence.*—The court holds that the verdict of the jury on conflicting evidence on the question of liability ought not to be disturbed, but that upon the attachment issue there was no evidence warranting the finding of the jury and that it must be set aside.

2. BRIEFS—*What They Should Contain.*—Counsel for appellants should in all cases precede their argument by a statement of facts, with abundant references, showing at what place in the abstract such facts appear.

Attachment, against an alleged partnership. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1897. Judgment in assumpsit affirmed. Finding in attachment and special execution set aside. Opinion filed June 14, 1897.

THOMAS J. WALSH, attorney for appellant.

EDGAR L. JAYNE, attorney for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit begun by suing out an attachment against appellant and William J. Watson, as partners.

Appellant denied that he had been or was a partner as charged, and also denied the allegations of the affidavit upon which the attachment was predicated.

The evidence as to the partnership was conflicting, and such that we do not feel that we ought to reverse the finding of the court below, holding appellant liable for the debt of W. J. Watson & Co.

Upon the attachment issue there was no evidence warranting the conclusion of the court and jury thereon.

Appellant testified directly and positively in denial of the allegations of the attachment writ. The objections made by appellant to certain instructions are, in view of the special findings of the jury, not well taken.

Barrow v. Sligh.

The judgment of the Superior Court against the defendant for the sum of \$3,281.60 is affirmed. The finding of the court upon the issue in attachment, and the award of special execution against the property attached, are set aside.

Appellant will recover judgment in this court for one-half of the amount that his costs exceed those of appellees.

Counsel for appellants should in all cases precede their argument by a statement of facts, with abundant references, showing at what place in the abstract such facts appear.

Judgment in assumpsit affirmed. Finding in attachment and special execution set aside.

William Barrow v. Leanore Sligh.

1. APPELLATE COURTS—*Jurisdiction of, as to Constitutional Questions.*—This court has no jurisdiction of cases involving the constitutionality of a statute.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Appeal dismissed. Opinion filed June 14, 1897.

N. N. CRONHOLM, attorney for appellant.

JOHN W. RICHEY, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

This is a suit by the appellee against the appellant for wages, and the Circuit Court added to the verdict in her favor attorney fees as part of the judgment.

The appellant argues that the statute under which the court acted is unconstitutional.

That argument ousts this court of jurisdiction. *Bernstein v. People*, page 175 this volume.

The appeal is dismissed.

John Ruddy v. Philadelphia & Reading C. & I. Co.

1. **PLEADING**—*Pleas Setting up Matter Admissible Under the General Issue.*—It is proper to sustain a demurrer to a special plea where the matters specially pleaded were admissible in evidence, if offered under the general issue.

2. **JUDGMENTS**—*Presumptions in Favor of.*—All presumptions necessary to support a judgment at law will be indulged in until overcome, and where there is no bill of exceptions a court of appeal will presume that all evidence in possession of a party to sustain his action or defense was admitted.

3. **ORDINANCES**—*An Ordinance of the City of Chicago Construed.*—An ordinance of the city of Chicago provided that "any person engaged in the business of selling coal in the city of Chicago, to be delivered in said city, shall deliver to the purchaser at the time of the delivery of the coal purchased, a certificate, signed by a city weigher, showing the weight of the coal so delivered, and the weight of the wagon or cart." *Held*, that the ordinance was intended to apply to sales of coal by weight to be delivered by wagon or cart, and that an allegation that coal was so sold and delivered is necessary to state a case under the ordinance.

Assumpsit, upon a guaranty. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

S. G. ABBOTT, attorney for appellant.

ULLMANN & HACKER, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was an action brought upon a contract of guaranty given by the appellant to the appellee, whereby he guaranteed the payment by one McCarthy, to the extent of \$300, for coal sold by the appellee to said McCarthy. The guaranty was specially counted upon, as was necessary it should be; and to such special count a special plea was filed, setting forth that the appellee had not complied with an ordinance of the city of Chicago regulating the sale of coal, by reason whereof the sale of said coal to said McCarthy was illegal and void. To such special plea a general demurrer was sustained, and for that, error is assigned.

The plea was unnecessary. The defense could have been

made under the plea of the general issue that was filed; and the law is that it is not error to sustain a demurrer to a special plea where the matters specially pleaded were admissible in evidence, if offered under the general issue. *Travelers' Pref. Acc. Co. v. Moore*, 58 Ill. App. 634; *Hartford Fire Ins. Co. v. Olcott*, 97 Ill. 439.

See, also, *Hankins v. The People*, 106 Ill. 628, which although a criminal case, is the same in principle.

There is no bill of exceptions here, although the record shows that the cause was submitted to a jury upon whose verdict the judgment was entered; and because all presumptions necessary to support a judgment at law will be indulged in until overcome, we may not know that all the evidence appellant had to sustain his defense was not admitted, as it might have been, under the general issue. *Curtiss v. Martin*, 20 Ill. 557; *Manny v. Rixford*, 44 Ill. 129.

The section of the ordinance relied upon is as follows:

"Any person or persons engaged in the business of selling coal in the city of Chicago, to be delivered in said city, shall deliver to the purchaser at the time of the delivery of the coal purchased, a certificate signed by a city weigher, showing the weight of the coal so delivered, and weight of the wagon or cart." Sec. 1213, Art. 13, Ch. 15, of the ordinance.

And the next section prescribes a penalty, by fine, of from \$20 to \$40, for each offense.

The special plea was defective in not setting up that the coal was sold by weight, and delivered by wagon or cart. It is manifest that the quoted section of the ordinance was intended to have application to sales of coal by weight, and delivered only by wagon or cart; and an allegation that the coal in question was so sold and delivered was material and necessary to state a case under the ordinance. For aught that appears the coal may have been sold by cargo, car load or pile, and delivered in that form, and hauled by the purchaser himself.

No other question being involved on this appeal, the judgment of the Circuit Court is affirmed.

Ella Fox et al. v. Oriel Cabinet Co.

1. **EXECUTIONS**—*Expenses of Officer Should be Approved by the Court—Rights of Third Parties.*—Although expenses of a sheriff having charge of an execution may have been treated by the parties in the execution as necessary expenses, and as such deducted from the amount made on the execution, yet before they can be lawfully allowed as damages in a proceeding against a third party, it should be made to appear that they have been ascertained and allowed by the court issuing the execution under which the property was seized.

2. **INJUNCTIONS**—*Solicitor's Fees on Dissolution of.*—The court holds that the appellant should have been allowed a proper amount for solicitor's fees for services rendered in procuring the dissolution of the injunction in this case.

Suggestion of Damages, from the wrongful suing of a writ of injunction. Appeal from the Superior Court of Cook County; the Hon. THEODORE BRENTANO, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed June 14, 1897.

MORAN, KRAUS & MAYER, attorneys for appellants.

GEORGE W. PLUMMER and WHARTON PLUMMER, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This is an appeal from an order of the Superior Court disallowing each and every item of damages claimed by the appellant in a suggestion of damages filed upon the dissolution of an injunction in a certain chancery cause, wherein the appellee was complainant and the appellants were defendants, begun in September, 1892, and dismissing the suggestion of damages at the costs of appellants.

The bill was filed by the appellee, a simple contract creditor of the copartnership firm of Spiegel & Co., against the appellants, who were judgment creditors of said firm, the members of said firm and the sheriff of Cook county, attacking as fraudulent certain judgments confessed by said

firm in favor of appellants for about \$95,000, and the levy of executions issued thereon, under which all the tangible assets and property of said firm had been seized by the sheriff, and were advertised for sale.

The bill charged numerous specific transactions and acts claimed to be fraudulent, and had for its object the restraining of the advertised sheriff's sale and the decreeing of such transactions as being in law a voluntary assignment by said firm, and for the administration of the estate of said firm in accordance with the voluntary assignment law of the State.

The sheriff's sale was advertised to take place on September 26, 1892. The bill was filed on September 24, and on the same day an *ex parte* injunction was ordered upon the recommendation of a master in chancery, and at once served; and later on the same day notice was given of a motion by appellants to dissolve the injunction, and such motion came on to be heard two or three days afterward and occupied two days in the hearing. The court took the matter under advisement, and announced his decision on October 7, dissolving the injunction. The suggestion of damages was thereupon filed, and was as follows:

"For counsel's fees, in procuring the dissolution of said injunctions, two thousand dollars.

For insurance, twenty-five dollars.

For coal, twenty-five dollars.

For custodian's fees, to wit, fifty dollars.

For rent, to wit, six hundred dollars.

For hire of clerks, etc., to wit, three hundred dollars.

For depreciation of the value of the goods, and damage done thereto, and loss of interest sustained, to wit, two thousand dollars."

No claim appears to be argued by the appellants for the last item, for depreciation, etc.

It was proved that the sheriff paid out \$16.32 for insurance upon the stock of merchandise during the period of delay caused by the injunction; for coal, \$12.10; for custodian's fees, \$48; for rent, \$586.66; for hire of clerk and help, \$250.

But in disallowing such items the court committed no error.

Although they may have been treated by the parties in the execution as necessary expenses, and as such deducted by the sheriff from the amount made on the execution, yet before they could have been lawfully allowed as damages in this proceeding against a third party, it should have been made to appear that they had been "ascertained and allowed by the court out of which" issued the executions under which the property was seized. Ch. 53, Secs. 19 and 53, Fees and Salaries Act; *Olds v. Loomis*, 10 Ill. App. 498; *Poppers v. Meager*, 33 Ill. App. 20.

It might be that, although so ascertained, the appellee, not being a party to the executions, would not have been bound by the allowance, but there being no authority except the statute for such charges, it would seem that the statute ought to be complied with as furnishing a legal basis for the equitable assessment of damages provided for by Sec. 12 of the Injunction Act.

Compensation for the injury the enjoined party has suffered because of the injunction is all that should ever be allowed; and such compensation should not find its justification in the acquiescence by the enjoined party in the sheriff's charges, unsupported by a judicial determination by the court having control of the enjoined writ, of the justness and propriety of such charges.

The acquiescence and good nature of the parties to the executions, concerning the sheriff's charges, ought not to prevail over the method pointed out by the statute, where the interests of third parties are involved. We conclude, therefore, that an ascertainment and allowance by the court out of which the execution issued, of the necessity and propriety of any of the sheriff's charges, was a preliminary requirement to the allowance thereof, on the suggestion of damages sustained by the dissolution of the injunction.

Concerning the solicitor's fees for services rendered in procuring the dissolution of the injunction, we are satisfied the case made was a proper one for an allowance thereof to

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a proper amount. But whether for so much as was claimed or proved, is a matter that the court below should first determine. The large charge for such services is predicated upon the importance of the case and the complexity of the law questions involved.

It would not seem that the law questions were either intricate or doubtful at the time the bill was filed. *Farwell v. Nilsson*, 35 Ill. App. 164; same case, 133 Ill. 45; *First Nat. Bk. v. N. Wis. Lumber Co.*, 41 Ill. App. 383; *Am. Cutlery Co. v. Joseph*, 44 Ill. App. 194; *Farwell v. Cohen*, 138 Ill. 216.

All of which cases, except that in 44 Ill. App., were decided before the bill was filed.

We refer to those cases, as well as to *Hayes v. C. & N. W. S. & G. Co.*, 37 Ill. App. 19, on the subject of enhancing damages by superfluous labor on the motion to dissolve, in order that the court below may have its attention called to the then condition of the law involved on the motion, for the purpose of arriving at a correct determination, under the evidence, of the amount of services necessary in procuring the dissolution of the injunction, and the value of such services. And for such purpose, as well as for a consideration of expenses and costs by the sheriff, if any were allowed by the court, out of which the executions issued, the decree is reversed and the cause remanded.

MR. JUSTICE WATERMAN.

The statute, Sec. 12, Chap. 69, provides that: "In all cases where an injunction is dissolved by any court of chancery in this State, the court, after dissolving such injunction, and before finally disposing of the suit, upon the party claiming damages by reason of such injunction suggesting, in writing, the nature and amount thereof, shall hear evidence and assess such damages as the nature of the case may require and to equity appertain, to the party damaged by such injunction, and may award execution to collect the same."

As is said in *Roberts v. Fahs*, 36 Ill. 268: "The object

of assessing damages is to compensate the party enjoined for the injury he has suffered. If he is wrongfully enjoined from doing one thing which he has a right to do, he is none the less injured because he is at the same time rightfully enjoined from doing another thing which he has no right to do."

I am therefore of the opinion that the court should have allowed the sheriff all such reasonable cost and expense as he was put to by the injunction. He had to store, watch and protect the goods levied upon; he would, therefore, be obliged to pay for storage, custodians, and, as it was prudent and usual to insure, for insurance. The court ought to be careful to see that the sheriff's expenses are only such as are reasonable; that extravagant charges and unnecessary outlay is not allowed. I do not think it necessary in assessing damages upon the dissolution of an injunction restraining an execution sale, that the amount allowed the sheriff for expense shall have been first submitted to and approved by the court, out of which the execution issued.

James H. Gilbert v. Buffalo Bill's Wild West Co.

1. *PROCESS—As a Protection to an Officer.*—A writ of replevin commanding an officer to replevy and deliver to another, property described in the writ, makes such property, as to the officer, goods and chattels, although the property may in fact be a part of the realty.

2. *PARTIES—In Replevin.*—A replevin writ must be directed against one from whom possession can be taken and to whom possession can be returned.

3. *RECOVERY—When the Evidence Shows a Defense.*—It matters not how it appears in evidence that a plaintiff has no case, if it does so appear he can not recover.

4. *SAME—In Trespass—When the Evidence Shows a Defense.*—If in an action of trespass against several one is defaulted and the others acquitted upon pleas which, if true, are a defense for all, the plaintiff can not have judgment against the one defaulted.

5. *TRESPASS—Against a Sheriff—Writ of Replevin a Defense.*—An action of trespass will not lie against a sheriff for taking property out of

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the custody of a defendant in the writ even where the sheriff took an insufficient replevin bond. In the latter event the action should be in case.

Trespass, for the wrongful levy of a writ of replevin. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Reversed without remanding. Opinion filed June 14, 1897.

PAM & DONNELLY, attorneys for appellant; E. R. BLISS, of counsel.

That a sheriff is protected by the writ of replevin, if he takes the property therein described, even if the owner of the property is not made a party defendant to the writ, is sustained by the great weight of authority. See Murfree on Sheriffs, Sec. 104c; Cobbey on Replevin, Secs. 644 and 645; Hallett v. Byrt, Carth. 351; Watson v. Watson, 9 Conn. 140; Weiner v. Van Rensselaer, 43 N. J. Law, 547; Hayden v. Shedd, 11 Mass. 500; Willard v. Kimball, 10 Allen, 211; Foster v. Pettibone, 20 Barb. 350; Shipman v. Clark, 4 Denio, 446.

Where it is sought to hold the principal liable in trespass for the act of the agent, when the agent or servant is discharged from liability, such in itself operates to discharge the principal from liability. King v. Chase, 15 N. H. 9; Featherstone v. Turnpike Co., 71 Hun (N. H.), 109; Castle v. Noyes, 14 N. Y. 329; Emery v. Fowler, 39 Me. 326; Lake Shore & M. S. Ry. v. Goldberg, 2 Brad. 228; Vigeant v. Scully, 35 Ill. App. 44.

A. B. JENKS, attorney for appellee.

The appellant having failed to plead justification under the writ of replevin, that defense was waived, and he was not entitled to the benefit of it, even though the writ of replevin was put in evidence by the plaintiff. Olsen v. Upsohl, 69 Ill. 273; Blanchard v. Burbanks, 16 Brad. 375.

In an action of trespass against a sheriff, in which he is declared against personally and not as sheriff, it is competent to prove that the deputy, assuming to act under color or by virtue of his office, committed the trespass complained of. Poisnett v. Taylor, 6 Cal. 78; Cotton v. Marsh, 3 Wis.

199; *Watson on Sheriffs*, 37; *Gregory v. Cotterell*, 5 E. & B. 571 (85 E. C. L.); 26 Am. & Eng. Enc'y of Law, 649, note 1; *Hirsch v. Rand*, 39 Cal. 315; 5 Am. & Eng. Enc'y of Law, 634; *Sanderson v. Baker*, 2 Wm. Bl. 832; *Murfrees on Sheriffs* (2d Ed.), Secs. 20, 21, and 59a-61a.

It is the duty of the sheriff to ascertain the value of the property, and take a bond in twice that value, and, if he does not do it, he is liable in trespass because of his failure to comply with this condition precedent. *Milliken v. Selye*, 6 Hill, 623; *Whitney v. Jenkinson*, 3 Wis. 363; *Wells on Replevin*, Secs. 385 and 388; *Morris v. Van Voast*, 19 Wend. 283; *People v. Core*, 85 Ill. 248; *Morse v. Hodsdon*, 5 Mass. 314.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

During the World's Fair year the appellee had a show place near the fair grounds, and when the fair was over left the place in charge of custodians, the custodian at the time of the events giving rise to this suit being one John Crowley.

September 22, 1894, one Barnett Graff sued out of the Circuit Court, a writ of replevin, which—the appellant being the sheriff—was delivered to the appellant to execute. In that writ John Crowley was one of the defendants. The appellant, by deputy, walked into the place, read the writ to Crowley and took the receipt of Graff for the property there—it being the property described in the writ.

For that transaction this action of trespass was brought by the appellee against the appellant and others, and a judgment of \$2,208 recovered.

The property was partly temporary buildings upon leased ground, but the writ made all the property—as to the appellant—goods and chattels. *Sample v. Broadwell*, 87 Ill. 617.

Crowley was the only proper defendant in the writ.

The writ must be against one from whom possession can be taken, and to whom possession may be returned. *Blatchford v. Boyden*, 122 Ill. 657; *Richardson v. Cassidy*, 63 Ill. App. 482; 20 Am. & Eng. Ency. Law, 1058.

As the appellee, in order to show the connection of the appellant with what the appellee charged was a trespass, was obliged to put in evidence the writ and return, the justification of the appellant—if he had any—was in for his benefit. *Savage v. French*, 13 Ill. App. 17.

It needs no authority that if the plaintiff's right of action is in issue, he can not recover unless he proves his right; can he be better off by proving affirmatively that he had no right? If, in an action of trespass against several, one is defaulted and the others acquitted upon pleas which, if true, are a defense for all, the plaintiff can not have judgment against the defaulted. *Briggs v. Bengier*, 2 Ld. Raym. 1372.

The principle is that it matters not how it comes in that the plaintiff has no case; if it does come in, he can not recover.

The defendant may be prevented from putting in facts showing that the plaintiff has no case, by neglect in pleading, but there is no such obstacle in the way of the plaintiff.

Now, will trespass lie against a sheriff for executing a writ of replevin, by taking the property out of the custody of a defendant in the writ? What has been said answers that question in the negative.

The court erred in giving an instruction as follows:

"If the jury believe from the evidence that James H. Gilbert, sheriff, acting through John C. McDevitt, his deputy, at the direction or in company with the other defendants, under a writ of replevin running against a person or persons other than the plaintiff in this suit, entered on land then in possession of plaintiff or its agent and took the personal property of plaintiff situated on such land, and converted such property to their own use, then their verdict should be for the plaintiff for the fair cash market value of such personal property with interest at five per cent from that date."

There was no pretense of any conversion of the property by the appellant, other than by the mere execution of the writ.

The appellee relies also upon the alleged fact that the sheriff took an insufficient replevin bond and is therefore liable in trespass, and the court so instructed the jury. That there is a *dictum* in *Morse v. Hodson*, 5 Mass. 314, and decisions in *Morris v. Van Voast*, 19 Wend. 283; *Milliken v. Selye*, 6 Hill. 623, and *Whitney v. Jenkinson*, 3 Wis. 363 (side page 407), to that effect is not to be denied; but there is no hint that such an action was ever thought of in the country from which we derive our common law. There the action has always been in case against the sheriff for taking insufficient sureties.

Here it may be case, or upon the official bond of the sheriff; Sec. 12, Ch. 119, R. S.; and the latter remedy was pursued in *People v. Core*, 85 Ill. 248.

Perhaps there is no difference in legal effect between the statute of this State and those under which the Massachusetts and New York decisions were made, and upon which the Wisconsin one was avowedly based; but there is such a difference in words that it may well be argued that the legal effect is different.

In Massachusetts the statute directed that the form of the writ should be to replevy upon condition that the plaintiff give bond, and in New York the statute forbid the execution of the writ unless the bond was given.

Here the statute is that before the writ is executed, the plaintiff shall give bond, but does not in terms require the sheriff to take the bond, and makes him liable "in an action on the case" for failure to take and return the bond.

In terms providing for an action on the case, upon the familiar rule that the mention of one thing excludes another, restricts the remedy. It is not probable that Judge Lawrence, in *Petrie v. Fisher*, 43 Ill. 442, had in mind the question that is before us, but his words indicate what is the first thought of a lawyer as to the remedy for neglect by the sheriff to take a replevin bond. On the whole it is our judgment that the action of trespass for taking the goods does not lie, though, under the statute, Sec. 22, Practice, the action under Sec. 12 of the Replevin Act, might be called trespass.

C. & A. R. R. Co. v. Swan.

The appellee moved that the bill of exceptions be stricken out and the appeal dismissed upon the authority of several cases, most of them decided by this court, which are all wrong. *Railway Conductors, etc., v. Leonard*. 166 Ill. 154.

The motion is therefore denied.

The appellant asked a variety of instructions, the effect of which was to find a verdict in his favor. For the error of refusing all of them, the judgment is reversed without remanding.

Chicago & Alton Railroad Company v. Walter R. Swan.

1. **PLEADING—*Defects Cured by Verdict.***—A defective statement of a good cause of action is cured by verdict. *Libby v. Scherman*, 146 Ill. 540, followed.

2. **FELLOW-SERVANTS—*The Rule Stated.***—If one servant is injured by the negligence of another, where they are directly co-operating in the same line of employment, or their duties are such as to bring them into habitual association, so that they may exercise a mutual influence upon each other promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable.

3. **SAME—*Must be Able to Exercise an Influence Over Each Other.***—It is not sufficient to constitute servants of a common master fellow-servants, within the rule exempting the master from liability, that at the time of an injury they were co-operating in some particular business in hand; it is also necessary that the circumstances be such that they may exercise an influence over each other promotive of proper caution.

4. **DAMAGES—*\$14,000 Held Not Excessive.***—Under the circumstances of this case, as disclosed by the evidence for the appellee, the court hold a judgment for \$14,000 for personal injuries is not excessive.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

MONROE & THORNTON, attorneys for appellant; WILLIAM BROWN, of counsel.

The limitations imposed do not apply if, at the time of the injury of one servant by another, such servants are

70	331
76	600
176	424
70	331
80	397
70	331
88	176
182	232
182	647

70	331
107	586

either: (1) associated in the performance of their duties, or (2) their employment requires co-operation, or (3) brings them together, or (4) brings them into such relations that they can exercise influence upon each other promotive of proper caution. *Chicago & N. W. Ry. Co. v. Moranda*, 108 Ill. 576; *Leeper v. T. H. & I. R. R. Co.*, 162 Ill. 215; *Louisville, E. & St. L. Rd. Co. v. Hawthorne*, 147 Ill. 226; *Chicago & A. R. R. Co. v. Kelly*, 127 Ill. 637.

The limitations are always separated by the disjunctive "or," not connected by the conjunction "and."

Servants of a common master will be fellow-servants, within the rule which prohibits recovery from that master by one servant for an injury occasioned by the negligence of the other servant, either (1) if, at the time of the injury, they are co-operating in some particular business in hand, or (2) if they are brought by their usual duties into habitual association, so that they may exercise an influence over each other promotive of proper caution. *Chicago & N. W. Ry. Co. v. Moranda*, 93 Ill. 302; *Same v. Same*, 108 Ill. 576; *Same v. Snyder*, 117 Ill. 376; *Same v. Same*, 128 Ill. 655; *Chicago & A. Rd. Co. v. Hoyt*, 122 Ill. 369; *Chicago & E. I. R. R. Co. v. Kneirim*, 152 Ill. 458.

F. H. TRUDE, attorney for appellee; DENNIS & RIGBY, of counsel.

The declaration was perfectly good. *L. E. & St. L. R. Co. v. Hawthorne*, 147 Ill. 226, 233; *Taylor v. Felsing*, 164 Ill. 331.

But even if it was defective, it was cured by the verdict and judgment below. *Stephen on Pleading*, 3d Am. Ed., 163; *Helmuth v. Bell*, 150 Ill. 263.

The plaintiff, baggageman, and the engineer were not, as a matter of law, fellow-servants within the rule of this State. Whether they were fellows, or not, was a question for the jury. *Chicago & A. R. R. v. O'Brien*, 155 Ill. 630; *L. E. & St. L. R. R. Co. v. Hawthorne*, 147 Ill. 226, 31; *R. R. v. Dwyer*, 162 Ill. 482.

And was correctly decided by them, under the facts of

this case. That servants are employed in the same department does not necessarily constitute them fellow-servants. *Chicago & A. R. R. v. O'Brien*, 155 Ill. 630.

Nor that they are engaged in the promotion of the same enterprise for a common master. *L. E. & St. L. R. R. Co. v. Hawthorne*, 147 Ill. 226, 230.

The plaintiff, as baggageman, was not directly co-operating with the train crew proper in the actual running of the train. Though employed on the train, his service was of a different kind or class from theirs, not necessarily bringing him into habitual consociation with them. He was not, as a matter of fact, within the rule.

The rule stated. *Chicago & N. W. Ry. Co. v. Moranda*, 93 Ill. 302; *Same v. Same*, 108 Ill. 576; *L. E. & St. L. R. R. Co. v. Hawthorne*, 147 Ill. 226; *Rolling Mill Co. v. Johnson*, 114 Ill. 57, 64; *Chicago & A. R. R. Co. v. O'Brien*, 155 Ill. 630.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellee was baggageman in the service of the appellant on a passenger train, and was injured by what "for the sake of argument" the brief of the appellant concedes was the negligence of the engineer on the locomotive of that train.

The first point relied upon by the appellant is that the declaration is bad, as it shows that the baggageman was injured by the negligence of the engineer of the same train, both of them in the service of the appellant, and does not aver that they were not fellow-servants; citing *Joliet Steel Co. v. Shields*, 134 Ill. 209, and *E. St. L. C. Ry. v. Dwyer*, 41 Ill. App. 522. The latter case is avowedly based upon the former, and the authority of the former is much diminished by what is said of it in *Libby v. Scherman*, 146 Ill. 540. It is there held that the lack of the averment, if a defect, is cured by verdict.

The main point of the appellant is that the baggageman and engineer are in law fellow-servants, because they co-operate in the transportation of the passengers and their baggage. *Abend v. T. H. & I. R. R.*, 111 Ill. 202.

On the point under consideration the authority of that case is destroyed by what is said of it in *Mobile & Ohio R. R. v. Massey*, 152 Ill. 144, which we need not quote.

"The rule in this State is, that where one servant is injured by the negligence of another servant, where they are directly co-operating with each other in a particular business in the same line of employment, or their duties being such as to bring them into habitual association, so that they may exercise a mutual influence upon each other, promotive of proper caution, and the master is guilty of no negligence in employing the servant causing the injury, the master is not liable. *Chicago & Northwestern Railroad Co. v. Moranda*, 93 Ill. 302; *Stafford v. Chicago, Burlington & Quincy Railroad Co.*, 114 Id. 244; *Chicago & Eastern Illinois Railroad Co. v. Geary*, 110 Id. 383; *North Chicago Rolling Mill Co. v. Johnson*, 114 Id. 57; *Chicago & Northwestern Railway Co. v. Snyder*, 117 Id. 376; *Same*, 128 Id. 655; *Chicago & Alton Railroad Co. v. Hoyt*, 122 Id. 369; *Chicago & Northwestern Railway Co. v. Moranda*, 108 Id. 576; *Chicago & Alton Railroad Co. v. Kelly*, 127 Id. 637; *Joliet Steel Co. v. Shields*, 134 Id. 209." *C. & E. R. R. v. Kneirim*, 152 Ill. 458.

The rule as thus settled is based upon a reason; a reason stated in *Rolling Mill v. Johnson*, 114 Ill. 57, thus:

"The idea is, that the relations between the servants must be such that each, as to the other, by the exercise of ordinary caution, can either prevent or remedy the negligent acts of the other, or protect himself against its consequences."

In the original formulation of the rule, *C. & N. W. R. R. v. Moranda*, 93 Ill. 302, the "power to incite each other to caution by counsel, exhortation or example, or by reporting delinquencies to the master," was, in argument, treated as essential to the existence of the relation of fellow-servants.

And in *C. & A. R. R. v. Hoyt*, 122 Ill. 369, the reason is expressed thus.

"What is meant is, if the parties continue to be engaged in a common service, they will be habitually associated, so

that they may exercise an influence over each other promotive of common safety."

The appellant, after laboriously analyzing a great many, if not all, the cases bearing upon the subject, comes to this conclusion :

"Servants of the same master will be fellow-servants within this rule, either :

1. If at the time of the injury they are co-operating in some particular business in hand, or

2. If they are brought by their usual duties into habitual association, so that they may exercise an influence over each other promotive of proper caution."

Thus the words "so that," which express a condition—Co. Lit., Sec. 329, cited in *White v. Naerup*, 57 Ill. App. 114—are limited to "habitual association," and excluded from application to servants "co-operating." We do not so understand the rule. Such a construction is contrary to the reason upon which the rule is based, namely, that the servant has in his power means for his own protection.

Nor is such construction the one that would be given to the words of the rule as expressed in 152 Ill. if they were words of contract or statute. *Rice v. John A. Tolman Co.*, 50 Ill. App. 516; S. C., title reversed, 164 Ill. 255; *Sturgeon Bay Co. v. Leatham*, 62 Ill. App. 386; S. C., 164 Ill. 239.

In adhering to what we have hitherto understood to be the construction of the rule, we do not overlook what is said in *C. & E. I. R. R. v. Kneirim*, 152 Ill. 458, in commenting upon instructions there under consideration, nor the quotation with apparent approval in *Leeper v. T. H. & I. R. R.*, 162 Ill. 215, from *C. & A. R. R. v. Murphy*, 53 Ill. 336, and we are not able to reconcile this opinion therewith; but in the first of those cases the question was not vital, and in the second the court was construing a finding of facts by the Appellate Court of the Fourth District, which in terms was that the relation between the negligent servant and the servant injured "was such as to promote caution for the safety of each other."

It is insisted that the damages, \$14,000, are excessive; not, however, if the testimony on the part of the appellee

be true. He was thirty-four years old, salary \$58 per month, in perfect health, has not been able to walk since, and suffers constant pain.

The medical testimony on his side corroborated his own as to his condition, and held out no hope of his recovery, but on the contrary indicated that the injury would accelerate his death.

The medical testimony on the part of the appellant is in conflict with the other. Which is most to be relied upon, we have no means to know.

A very plausible argument against the amount is based upon the refusal of appellee to submit to further examinations by medical men on behalf of the appellant. But if we were to say that because of such refusal, the damages are excessive, it would be in effect to say, not that the damages are not justified by the evidence, but that part of them should be forfeited as a punishment for such refusal.

On the whole case there is no error unless it be held that in law the engineer and the appellee were fellow-servants for the reason that they were co-operating as servants of the appellant in transporting passengers with their baggage.

If that be the law, the question will be before the Supreme Court on the refused instruction to find for the defendant. The judgment is affirmed.

MR. JUSTICE WATERMAN.

I speak for the whole court in saying that the counsel for appellant is entitled to great credit for the careful analysis he has presented of the decisions in this State concerning whom are to be regarded as fellow-servants.

North Chicago St. R. R. Co. v. Rosalie J. Anderson.

1. MEASURE OF DAMAGES—*In Actions for Personal Injuries.*—The compensation for injuries to a previously healthy and active woman and mother, leading a life of usefulness to herself and others, is beyond the domain of exact measurement, and the law has wisely left its ascertainment to a jury.

North Chicago St. R. R. Co. v. Anderson.

2. **VERDICTS—When Not to be Set Aside.**—Unless a reviewing court can see from the record that a verdict in an action for personal injuries is the result of improper influences, it will not be set aside for excessiveness, especially where the discretion of the trial judge has been exercised by requiring a remittitur to satisfy his sense of what is adequate compensation.

3. **ATTORNEYS—Their Duty to Talk to Witnesses.**—It is not only the right but the duty of an attorney of a party to a cause to talk to his witnesses and to learn from them their knowledge of the facts and circumstances of the case, and what their testimony will be concerning the same before calling them to the stand to testify and no improper inferences are to be drawn from the performance of such duty. To instruct a jury that such fact may be considered by them, together with all the other facts in evidence, in determining the weight of the testimony of such witnesses, may in a proper case be ground for reversal.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

RICHARD PRENDERGAST and CARLETON N. GARY, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from a judgment for \$10,000, entered after a remittitur of \$7,500, from the verdict of a jury, in an action brought by the appellee to recover for injuries sustained by her through the alleged negligence of the appellant in suddenly starting one of its cable trains while the appellee was in the act of getting upon a car of said train, which had stopped to take on passengers and was at a stand when she started to get aboard.

The defense was, mainly, that the train had started before appellee began to get aboard, and that in attempting to get on while the train was in motion, appellee was guilty of such contributory negligence as precluded her from a recovery. If such defense was not made out, the appellant does

not dispute appellee's right to recover something, but does vigorously insist that she should not have so much.

We have carefully considered all the evidence concerning the principal fact, and, in the observance of well-established rules as to the province of a jury upon the facts of a case, we are not at liberty to override the finding by the jury that the train was standing still, for the purpose of taking on passengers, when appellee started to get on the car, and until she had partly got aboard, and that the train was negligently started up before she had wholly mounted the car step, thereby causing her to be dragged and finally thrown to the ground.

There is no question made but that the injuries sustained by the appellee were both serious and permanent. Of the injuries the appellant's brief states: "The injury in this case received by the plaintiff was a fracture of the upper portion of the femur. From the testimony, considering her age (51 years), this will probably never perfectly heal. The injury is, and about it there is no question, what is known in anatomical parlance as an *intra capsular* fracture of the femur, and, as we have stated, the testimony shows that the bone will probably never perfectly unite. Concerning the injury there is no conflict."

Uncontradicted evidence shows that the appellee suffered great pain for a long time and is still subject to it; that it was three years before she left the house; that since the cast was taken off her leg she has not been able to sleep in a bed, but has to sleep on a lounge, and that she can not turn over without holding her limb by her hands, and can not move about on her feet except by the aid of crutches or other support.

What is compensation for such injuries to a previously healthy and active woman and mother, leading a life of usefulness to herself and others, is beyond the domain of exact measurement, and the law has wisely left its ascertainment to a jury.

Unless a reviewing court can see from the record, evidences which, although not entirely lacking in this case,

may hardly be considered as controlling, that a verdict in a case of this character is the result of improper influences, the verdict will not be set aside for excessiveness, especially where the discretion of the trial judge has been exercised by requiring a remittitur to satisfy his sense of what is adequate as compensation.

Of assigned errors concerning the instructions, we see no occasion to mention more than the modification by the court of the twenty-second instruction asked by the appellant.

As requested, that instruction was as follows:

"22. The mere fact that a witness has talked to an attorney of a party to this suit and has told such attorney what the said witness would testify on this trial, does not of itself in any wise tend to impeach or discredit the testimony of such witness."

But the court modified the instruction by adding to it, as follows: "But such fact may be considered by the jury, together with all the other facts in evidence in determining the weight of such testimony."

The instruction as asked was correct, and it should not have been modified as it was.

It is not only the right, but the duty of the attorney of a party to a cause to talk to his witnesses and to learn from them their knowledge of the facts and circumstances of the case, and what their testimony will be concerning the same before calling them to the stand to testify, and no improper inferences are to be drawn from the performance of such duty. To tell the jury that such a circumstance of itself goes to the credibility of witnesses or to the weight of their testimony, is to tell them what is not the law, and never was the law; and to so instruct a jury as to the law, might, in a proper case, be ground for the reversal of a judgment. See *C. & G. T. Ry. Co. v. Spurney*, 69 Ill. App. 549.

But it does not necessarily follow that this judgment should be reversed on that account. It is for prejudicial error alone that judgments will be reversed, and here, upon a review of the whole record, it does not seem to be at all

probable that the verdict was in anywise affected by the modification of the instruction.

Discerning no substantial error in the record sufficient to justify a reversal of the judgment, the order is that it be affirmed.

James McKenna v. Julia McKenna.

1. ALIMONY—*Where the Marriage is Denied.*—In applications for alimony *pendente lite*, where the existence of the marriage is denied, no order for the same can properly be made until a hearing has been had by the court and the relation of husband and wife found to exist.

Bill, to set aside a former decree. Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Reversed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

This was a bill filed July 23, 1896, to set aside a former decree of the Circuit Court of Cook County, and for a separate maintenance.

The bill set forth that in the spring of 1862, complainant was married to James McKenna, and continued to live with him as his wife until June 30, 1894, when he drove her from their said home; that during the time complainant and defendant cohabited as husband and wife six children were born to them, none of whom are now living. That on said 30th of June, 1894, she filed her bill for a separate maintenance; that in said former suit the following decree was entered on the 14th day of July, 1894:

"This cause now coming on to be heard on the bill of complaint herein and the answer of the defendant herein, the complainant appearing in person and by Albert Phalen, her solicitor, and the defendant appearing by Barnum, Humphrey & Barnum, his solicitors, and it appearing to the court that the complainant consents that her bill of complaint herein be dismissed for want of equity, it is therefore ordered, adjudged and decreed, that the said bill of com-

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plaint be, and the same is hereby, dismissed for want of equity, without costs to either party, said costs having been paid."

The bill then alleges that complainant was asked to sign a certain agreement, or paper, which was also signed by said defendant, which is as follows:

"This agreement, made and entered into at Chicago, Illinois, this 14th day of July, A. D. 1894, by and between Julia, otherwise called Bridget Doyle, an unmarried woman, and James McKenna, an unmarried man, witnesseth:

That whereas, the said Julia or Bridget Doyle, by the name of Julia McKenna, has filed in the Circuit Court of Cook County a bill in chancery in cause general No. 131,676, in said court, against the said James McKenna, wherein she alleges, among other things, that she is the wife of the said James McKenna, and prays, among other things, a separate maintenance as such alleged wife; but the said James McKenna denies that she is his wife.

And whereas, in fact, the said Julia, or Bridget Doyle, so suing as Julia McKenna, is not and never has been the wife of the said James McKenna, and she has no legitimate claims, past, present or future, in his lifetime, or after his death, against him or his property or estate, as his wife, and hereby agrees to make no such claims, and consents that a decree may be entered in said chancery cause dismissing her said bill against him for want of equity.

Now, therefore, in consideration of the premises, the said James McKenna hereby covenants and agrees to pay to her, the said Julia, or Bridget Doyle, otherwise calling herself Julia McKenna, thirty dollars (\$30) in cash on the execution of this agreement, the payment and receipt of which is by her hereby acknowledged, and also to pay to her thirty dollars (\$30) per month on the 14th day of every calendar month hereafter, as long as she shall live; and he further covenants that he will pay all reasonable and necessary bills which she may incur for medicines and medical services on account of any sickness or injuries which may befall her during her life; and the obligations and covenants herein of the said

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James McKenna shall be binding upon him, his heirs, executors and administrators.

The said Julia or Bridget Doyle hereby accepts the provisions herein made for her in full satisfaction, extinguishment, and for full release and renunciation which she hereby gives and makes of all claims, rights and interest, which she would or might have upon the said James McKenna and his property or estate during his lifetime or after his death, if she were or had been his wife.

This agreement is made and accepted on both sides in full settlement of all past and present differences between them of every name and nature.

Witness our hands and seals this day and date aforesaid.

(Signed) JULIA MCKENNA, [SEAL.]
Suing as Julia McKenna.
(Signed) JAMES MCKENNA, [SEAL.]
James McKenna."

Complainant alleges that the dismissal of the said bill and the entry of the decree by the defendant and his counsel was by fraud and misrepresentation on the part of the defendant and of his counsel, and of one Phalen, pretending to represent the complainant; that the defendant promised to provide for the complainant fully and amply, and would pay her \$30 a month during her life. That during the months immediately following, and until the month of January, 1895, the payments of said money, to wit, thirty dollars (\$30), were sent by the defendant to the complainant. That defendant knowingly and falsely misled complainant by causing and procuring a decree to be entered in said cause; that said defendant and said counsel, pretending to represent this complainant, falsely induced complainant to sign the so-called fraudulent agreement, with the intention of deliberately setting the same up as a defense, and that the allegations of the complainant contained in the bill filed therein were true.

Appellant appeared in this cause and moved to strike the bill from the files and to dismiss the suit.

On December 18, 1896, an order was entered as follows:

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“First. That motion filed on behalf of defendants to strike the bill filed herein from the files be overruled and disallowed.

Second. That motion for solicitor's fees and alimony *pendente lite* be allowed. The court decrees that said defendant McKenna pay to complainant, within thirty days from this date, the sum of \$350 as and for temporary alimony on behalf of the complainant, and expenses heretofore incurred; that said defendant pay the additional sum of \$30 per month to complainant as additional alimony *pendente lite*, said payments beginning on the 1st day of December, 1896. And it was further ordered and decreed that said defendant pay to the solicitor for the complainant as and for complainant's solicitor's fees, the sum of \$300.”

January 21, 1897, appellant filed his verified answer, denying that appellee is or ever was his wife; also setting forth that appellee brought suit against him upon the agreement set up in her bill, and obtained before a justice of the peace a judgment against him for \$90. Appellant also, on January 11th, moved that the order for alimony and solicitor's fees entered in the present suit be set aside, and in support of such motion filed an affidavit setting forth that said order was entered without his knowledge and wholly without his consent and approval; that he was not served with notice of an application for alimony and solicitor's fees; that said order was irregularly entered, without opportunity for affiant to be heard, his counsel having entered a special and not a general appearance, as hereinbefore stated, which motion of appellant was overruled.

STRONG, STRUCKMANN, EHLE & MILSTED, attorneys for appellant.

W. A. DOYLE and J. D. ANDREWS, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

An order to pay temporary alimony or solicitor's fees must be based upon a finding that the party so commanded to pay is the husband of the complainant. If such condition

be admitted or not denied, it may, for the purpose of the order, be assumed.

In the view of the writer of this opinion, when the existence of the alleged marriage is denied, no such order can properly be made until a hearing has been had and the court upon it finds and adjudges that the relation of wife and husband exists.

If, before hearing and without regard to the denials of the defendant, an order to pay temporary alimony and solicitor's fees can be made upon the mere filing of a bill alleging marriage of the complainant to the defendant, cause for divorce or separate maintenance, and ability of the defendant to pay, then an easy method for procuring the temporary support of unmarried women and good fees for the bar has been found.

Upon disputed questions of fact to compel one to pay without a hearing, is to deprive him of property without due process of law, for due process of law involves a hearing upon the allegations and denials of the parties.

If the defendant merely deny the alleged cause for separation, ordinarily, an order for alimony and solicitor's fees may be made, for the fact of marriage entitles the suing wife to such order, whether she has cause or not for bringing suit; while if there be no marriage there can not be obligation to support or to furnish funds to enable the complainant to prosecute lawsuits. Bishop on Marriage and Divorce, Vol. 2, Sec. 924; Vreeland v. Vreeland, 3 N. J. Eq. 43.

In the case of Schonwald v. Schonwald, 1 Phillips' Eq. 219, which is based upon the statute of North Carolina, there is a *dictum* to the effect that temporary alimony may be allowed, notwithstanding a denial of the marriage by the defendant, the court saying:

"Our statute is general * * * and puts the right to be allowed alimony *pendente lite* upon the sufficiency of the matter set forth in the petition; proceeding upon the idea that it is better when a woman makes oath, under the penalty affixed to perjury, to the fact of marriage, to take it to be true for the purpose of allowing alimony *pendente lite*,

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even although it may turn out to be false, and the man may have but little chance to get back what he ought not to have been compelled to pay, rather than subject a wife to the danger of starvation, if a brutal husband makes oath denying the fact of marriage, which may turn out to be false."

The logical conclusion from such premise is, and the more accurate statement would be, that it is better to compel any man to pay temporary alimony and expenses of suit to any woman who may see fit to make oath that he is her husband, however strongly he may deny the accusation, rather than allow her to be in want of money which he has.

In the present case it appears from the bill filed by appellee two years before bringing the present suit, she, under her hand and seal, declared that she was not and never had been the wife of appellant, and had no claim upon him, and that she consented that her suit for separate maintenance be dismissed for want of equity; and that such decree was thereupon entered.

The bill in the present case alleges that such decree was procured by fraud of appellant, and appellee asks that it be set aside, but she does not allege that since the entry of the same there has been any marriage or act indicating a marriage relation.

In the face of such statement and decree, the court should not, without some proof, have awarded to the complainant temporary alimony and solicitor's fees.

The order of the Circuit Court is reversed.

In No. 202 of the present term, *McKenna v. McKenna*, the record being the same as that in which the foregoing opinion is given, the order of the Circuit Court is reversed.

Illinois Central Railroad Company v. William McCowan.

1. **FELLOW-SERVANTS**—*Foreman of Contractors, and Employes of a Railroad Company.*—A foreman and gang of men were building stone walls, the work being done for a railroad company by contract, under which the railroad company was required to furnish the necessary

switching and side track facilities to place the stone at the sites where it was to be used, the company to unload it promptly, and under which contract the course of business was that said foreman directed the servants of the railroad where he wanted the stone placed, but had no voice in saying how they should be got there. *It was held*, that the relation of fellow-servants did not exist between such foreman and the servants of the railroad company.

2. TRIALS BY THE COURT—*Effect of Finding*.—The finding of a court trying a cause without a jury, in regard to questions of negligence and ordinary care, stands upon the same footing as the verdict of a jury upon such questions.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Mr. Justice WATERMAN, dissenting. Opinion filed June 14, 1897.

JOHN G. DRENNAN, attorney for appellant; JAMES FENTRESS, of counsel.

RICHARD PRENDERGAST, attorney for appellee.

MR. PRESIDING JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

Under a peculiar stipulation, which there is no need to copy, this case was tried without a jury. The only claim of the appellee on the trial and here, was and is, that he was rightfully at work upon the north end of a car standing still, and that the appellant bumped from the north another car against the one he was upon, and as a result he fell off to the north, and was run over by the car that had come against the one upon which he was.

This version stands only upon his own wholly uncorroborated testimony, contradicted by the testimony of all the other persons present—some half dozen.

In such a case a verdict of a jury or finding of a court against the overwhelming preponderance of the evidence, ought not to stand. *North Chicago St. Ry. v. Lotz*, 44 Ill. App. 78.

Vituperation and charges of perjury and subornation of perjury, do not supply the lack of proof that the manner of the injury to the appellee was as he states it to have been.

Whether upon the real facts the appellee has any right to recover, is a question which remains to be considered.

The record furnishes us no information as to the ground the court went upon in finding for the appellee.

He was the foreman of a gang of men building stone walls in work being done by contract for the appellant. The contract between the appellant and the employers of the appellee required the appellant "to furnish the necessary switching and side track facilities" to place the stone at the sites where it was to be used—the employers to unload it promptly. Under this contract the course of business was that the appellee did direct the servants of the appellant where he wanted carloads of stone placed, but had no voice in saying how they should be got there.

There was no fellow-servant relation between the appellee and the servants of the appellant.

A car loaded, or partly so, with stone, was being pushed south on the track. In the train were four cars—one south of the one first spoken of, and two north of it, and between it and the locomotive.

On the car first spoken of, and near the south end of it, the appellant was at work "dogging" a stone—making holes in it for placing tools to lift it off the car.

The conductor of the train was on the ground at the side of the train, and at the moment of the injury to the appellee within "eight or ten feet" of both the appellee and a brakeman on the south car, and directed the brakeman to pull the pin of the coupling between the cars, and also directed the locomotive engineer to stop.

It is readily seen that as the train was backing at a speed of about four miles an hour these movements left the south car free to proceed, when the speed of the rest of the train diminished before stopping, and that the tendency of moveable objects, on the car the appellee was upon, was to go over to the south end of that car, by reason of the momentum gained by the movement of the car. The appellee was such an object—off his guard by attention to the work of "dogging" the stone, no doubt in an attitude not favor-

able to steady standing—and he went over the south end of the car, which, not stopping instantly, ran over him, in “drifting south, probably a car length.” The evidence does not justify us to say that the attention of the appellee was called to the fact that the movements directed by the conductor were about to be made, nor that he in any way had notice of what was about to happen.

Now, if the case had been tried by a jury, under correct instructions, or none at all, and a verdict been rendered (as it would have been) for the appellee, could we say that the appellee, absorbed in his work, without notice of anything to excite apprehension of danger, was not in the exercise of ordinary care, and that the servants of the appellant, knowing his position, and the tendency upon him of the movements about to be made, were not negligent in making those movements without calling his attention? Unless we could answer one or the other of those questions in favor of the appellant, we could not disturb such a verdict, and the finding of the court stands upon the same footing. There are counts in the declaration that fit such a case, and for ought we know, it was upon that case that the court held that the appellee was entitled to recover. We have a strong suspicion that in taking this view we are—while reviewing the record—not reviewing the action of the Circuit Court; but it is upon the record that we must act, and if error is not there shown, the judgment must be affirmed.

The contract between the appellant and the employers of the appellee provided that the appellant would “not furnish transportation for any of the contractors, foremen or laborers, to or from the work.” It would be straining the words to hold that the presence of the appellee upon a car, preparing a stone for unloading, was thereby wrongful, even if the car was moving in the course of switching.

Upon the whole record we can not say that the judgment is wrong, and it is therefore affirmed.

MR. JUSTICE WATERMAN, dissents.

70	349
175	514
70	349
92	621

Humiston, Keeling & Co. v. Charles G. Wheeler.

1. **LEASE—What Passes as Appurtenances.**—The lease of a building with the appurtenances passes the land upon which it stands and that appurtenant thereto, to the lessee, and a partial destruction of the building by fire does not terminate the lease.

2. **EVICITION—What is Not.**—The fact that a landlord re-enters upon leased premises and repairs a building damaged by fire without objection on the part of the lessee, and requests such lessee to remove his effects from such building, does not amount to an eviction.

3. **LANDLORD AND TENANT—When the Landlord May Relet for the Benefit of the Tenant.**—Where the lessee of a building damaged by fire permits the landlord to repair the same, but vacates the premises, insists that the lease is terminated and refuses to pay rent, the landlord may relet the same for the benefit of such tenant lessee, and his liability for rent will be diminished to the amount of rent from such reletting.

4. **SAME—Acceptance Necessary to a Surrender.**—A surrender of premises by a tenant during a term to be effectual so as to amount to a termination of the tenancy must be accepted by the landlord.

5. **SAME—Re-entry for Making Repairs Not an Eviction.**—Taking possession of premises damaged by fire, by a landlord, with the apparent consent of a tenant, for the purpose of making necessary repairs, is not an eviction, nor is a tenant who has abandoned the premises and refused to pay rent relieved from liability by the action of the landlord in renting the premises to another party, save to the extent of the rent received by the landlord on account of such renting.

Debt, for rent. Appeal from the Superior Court of Cook County; the Hon. JONAS HUTCHINSON, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

This suit was brought by the appellee (plaintiff below) to recover rents for certain parts of the premises known as 143 and 145 Lake street, from March 13, 1891, to May 1, 1892, less the sum of \$2,400, \$300 of which was obtained by the appellee for temporary lease in the fall of 1891, and the remainder, \$2,100, for rents received at the rate of \$525 per month, for January, February, March and April, 1892.

The record shows that plaintiff rented to appellant certain premises at 143 and 145 Lake street, Chicago, from

May 1, 1890, to May 1, 1892, at \$400 per month—\$200 to be paid in cash and \$200 to be paid in trade. The building was five stories high, and the premises rented were Nos. 143 and 145 Lake street, except the fourth floor and stairway leading thereto, part of the basement and second floors, use of gas engine for grinding drugs, and of pumps and engines for raising water to the fourth floor, etc.

On the night of March 13, 1891, a fire took place which burned out most of the interior—leaving the walls standing, also a portion of the third and fourth floors and the entire first floor and basement—the first floor being covered with debris from the other floors.

On the morning of March 17th appellee claims to have met Humiston at the building, and that Humiston asked him if he should rebuild, and that he replied he would do so as soon as possible—and that either Humiston or Keeling told him they (the defendant) had taken a new store.

He further claims to have called on them at the close of March, and asked for rent for the month of March, and that they paid him $\frac{1}{3}$ sts of a month's rent, or $\frac{1}{3}$ sts of \$200.

That he then refused to sign a receipt in full, but took the money on account. That they then told him they had taken a new store, and that he then said he "had let the contract for repairing the old store," and "that he expected them to occupy it or find a tenant."

All of these conversations, however, are specifically denied by both Humiston and Keeling, and defendant claims that the only communication had (prior to June 6th) was the receipt of a postal card which Wheeler admits sending on April 24, 1891, which was addressed to defendant, and is as follows:

"Please remove your barrels, empty and full ones, from 143 Lake St., to-morrow, Friday, as they are in the way of my contractors."

Appellant claims that there was no payment made on the last of March; but that \$100 was paid on April 29, 1891.

Appellee admits the payment of all rents accrued prior to the fire of March 13th.

At the end of March, after the fire, appellee told defendant that he was "going to rebuild." On the 24th of April appellee began rebuilding the structure.

Appellee took possession of the entire building and premises and rebuilt the structure. It was completed about June 6th, and on that day Wheeler wrote appellants advising them that the building was ready for occupancy, and requested them to return as his tenant.

Appellant answered on June 8th, saying it had not been his tenant since the morning of March 14th.

Appellee placed the premises in the hands of an agent for rent as early as May 27th, at \$6,500 per year. Appellant was paying only \$4,800 per year, one-half cash and one-half in trade.

In December of 1891, plaintiff rented the store of the premises to a clothing house for about \$300, and for January, February, March and April, 1892, he obtained rent at the rate of \$525 per month for the entire premises.

Under these circumstances this suit is brought to recover the entire rental of \$400 per month, under the lease, from the time of the fire, March 13, 1891, up to May 1, 1892, less only the amounts received as above, and with interest on all installments, and verdict and judgment were rendered in the court below accordingly.

The lease in this case contains no covenant to repair by the landlord; it in terms gives no right of re-entry to the landlord.

Nor does this lease grant to the landlord any right to relet the premises.

The tenants were to return the property in as good condition as when entered upon, "loss by fire, or unavoidable accident, or ordinary wear excepted."

FLOWER, SMITH & MUSGRAVE, attorneys for appellant.

Where, as in this case, only a portion of a building is rented and the building is destroyed by fire, or that portion rented is destroyed by fire, the lease is terminated. Taylor on Landlord and Tenant, Sec. 520; Wood on Landlord and Tenant, (2d Ed.), pages 1032 and 1033; Shawmut Bank v.

Boston, 118 Mass. 125; Harrington v. Watson, 50 Am. Rep. 465, and note on page 469, and cases cited therein; Porter v. Tull, 22 L. R. Ann. 613, and note appended; 12 Am. and Eng. Ency. 757.

The landlord, Wheeler, being given no right of re-entry by his lease under any circumstances, having entered therein and taken exclusive possession of the premises, and rebuilt the building, was guilty of a total eviction, and even if his acts were with the consent of the tenant, it constituted a surrender of the lease. McGaw v. Lambert, 3 Pa. St. 444; Hoveler v. Fleming, 91 Pa. St. 324; Halligan v. Wade, 21 Ill. 470; Taylor on Landlord and Tenant, 5th Ed., Sec. 378, pages 276 and 277.

· SIGMUND ZEISLER, attorney for appellee.

· The tenant must not only abandon the premises, but it must also appear that he abandoned them on account of the acts of the landlord, which are claimed to operate as an eviction; and if his abandonment was due to other causes, in part even, he can not set up such acts in defense to an action for the rent. Wood, Landlord and Tenant, (2d Edition), page 1107.

· If the tenant abandons the premises before the expiration of his term, the landlord has a right to re-enter. 12 Am. & En. Ency. of Law, 684.

· The landlord has an unquestioned right to re-enter demised premises for the purpose of making such repairs as are indispensable to the preservation of the reversion. 12 Am. & En. Ency. of Law, 725.

· By the common law, where the tenant abandons the premises during the term without fault of the landlord, it is no relief from the payment of rent. The landlord may thereupon take possession, re-rent and credit the first lessee with the proceeds. 12 Am. & En. Ency. of Law, 751.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The lease being of the premises, 143 and 145 Lake street, "with the appurtenances," except certain portions of the

building, the land upon which the building stood and that appurtenant thereto, passed to the lessees. *Wood on Landlord & Tenant*, Sec. 212; *Sherman v. Williams*, 113 Mass. 481; *Shep. Touchstone*, 94.

Such being the case, the partial destruction of the building did not terminate the lease. *Nonotuck Silk Co. v. Shay*, 37 Ill. App. 542.

Did appellee, by rebuilding, release appellant from its liability as a tenant?

Had appellee done nothing, appellant would have had to pay rent to the end of the term, for a building which, in the condition it was left by the fire, was useless. The act of appellee in rebuilding was therefore in the highest degree beneficial to appellant. So far from the rebuilding being a thing of which appellant may justly complain, it was for its interest and benefit, and went on without its protest.

There was, by appellee, no interference with appellant's possession, save such as was necessary in order to rebuild, and none to which appellant objected.

Appellant was by the fire driven out of the building; only a small quantity of its goods remained in the premises. Doubtless it could have insisted upon its right to full possession of all it had rented, and thus prevented a rebuilding by appellee, or it might itself have rebuilt, but it evinced no disposition to do either.

Neither the rebuilding by appellee nor the request to appellant to remove its barrels, etc., was an eviction. *Wood, Landlord and Tenant*, Sec. 481; *Nonotuck Silk Co. v. Shay*, 37 Ill. App. 542.

Did the offer by appellee to rent the premises, and the actual renting of them by him, discharge appellant from its liability?

Before this was done, appellant had not only stopped paying rent, but insisted that its tenancy was at an end.

The reletting of the premises was for the benefit of appellant, as thereby the amount of its liability was diminished. *Scott v. Beecher et al.*, 91 Mich. 590; *Rich v. Doyenn*, 85 Hun, 510; *Lane v. Nelson*, 31 Atl. Rep. 864.

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Whenever a breach of contract is made, the party against whose right the breaking is should endeavor to make the consequent damage as light as possible. Sutherland on Damages, Vol. 2, 473; Joslin v. McLean, 99 Mich. 450.

A surrender of premises by a tenant during a term, to be effectual so as to amount to a termination of the tenancy, must be accepted by the lessor.

In the present case appellee refused to accept the surrender, and notified appellant that the building was ready for its occupancy.

Taking possession of premises by a landlord, with the apparent consent of a tenant, for the purpose of making necessary repairs, is not an eviction; nor is a tenant, who has abandoned premises and refused to pay rent, relieved from liability by the action of his landlord in renting the premises to another party, save to the extent of the rent so received by the landlord from another. Nonotuck Silk Co. v. Shay, 37 Ill. App. 542; Scott v. Beecher, 91 Mich. 590; Stewart v. Sprague, 71 Mich. 50; Rich v. Doyenn, 85 Hun, 510; Joslin v. McLean, 99 Mich. 480.

The judgment of the Superior Court is affirmed.

**Wheeler Chemical Works and C. Gilbert Wheeler v.
The Boston National Bank.**

1. BILL OF EXCEPTIONS—*Affidavits Read on a Motion for a New Trial.*—Affidavits read on a motion for a new trial must be preserved in the bill of exceptions. The certificate of the clerk stating that they are the affidavits referred to in the bill of exceptions is a nullity.

Assumpsit, on promissory notes. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

H. M. PIERCE, attorney for appellants.

OTIS & GRAVES, attorneys for appellee.

Harding v. Kuessner.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The appellants first demurred to the declaration, and the demurrer being overruled, pleaded. No question is now in the case as to the demurrer, which was waived by pleading. *Foltz v. Hardin*, 139 Ill. 405.

The case was tried without the presence of any representative of the appellants, and whether any cause existed for granting a new trial, we can not inquire, as the affidavit upon which a motion for a new trial was based, is not in a bill of exceptions. We may not read it upon a certified copy by the clerk of the court.

Wright v. Griffey, 146 Ill. 394, is one of dozens of cases to that effect. The statement of the clerk that it is the affidavit referred to in the bill of exceptions is a nullity. *Smith v. Trimble*, 27 Ill. 152, *Village of Melrose v. Bernard*, 126 Ill. 496; *Chicago, M. & St. P. Ry. v. Yando*, 127 Ill. 214.

There is no error shown, and the judgment is affirmed.

70	355
173a	125

**George F. Harding and Firemen's Insurance Co. v.
Ferdinand Kuessner, for Use, etc.**

1. **APPEAL BONDS—*What is a Breach of.***—The non-payment of the amount due upon a judgment which has been affirmed in part on appeal, a remittitur having been entered to the balance, is such a breach of the appeal bond as will support an action.

Debt, upon an appeal bond. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

WM. J. AMMEN, attorney for appellants.

NELSON MONROE, attorney for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action brought upon a bond given upon an

appeal to this court from a judgment rendered against the insurance company.

Upon such appeal, in this court, the plaintiff remitted the sum of \$390.28, and the judgment of the Superior Court was affirmed for \$1,072.22. Appellants contend that as the judgment of the Superior Court was not affirmed *in toto*, and as the Firemen's Insurance Company has taken an appeal from the judgment of this court, there has been no breach of the condition of its bond.

It does not appear from the record in this cause, here filed, that an appeal has been taken from the judgment of this court affirming the judgment of the Superior Court, upon appeal from which the bond was given. It was not necessary to aver or prove that no appeal had been taken. 2 Chitty's Pleading, 484n.

The affirmance by this court of the judgment of the Superior Court for \$1,072.22, and the failure to pay the same, constituted a breach of the condition of the bond.

The judgment of the Superior Court is affirmed.

70 356
172s 337

Standard Brewery v. Jacob Nudelman.

1. CHATTEL MORTGAGES—*After-Acquired Property*.—A chattel mortgage upon property to be acquired by the mortgagor after its execution is ineffectual.

2. SAME—*Upon a Stock of Merchandise Kept for Sale*.—A chattel mortgage upon a stock of merchandise on hand and kept for sale is void as against purchasers.

3. SAME—*Foreclosure by Agents Under General Directions*.—General directions to his salesman by the holder of a chattel mortgage, which covers the right of possession of the premises, to foreclose the same, leaves to such salesman the exercise of discretion as to taking possession of the premises.

4. VERDICTS—*When Final*.—A verdict upon conflicting and irreconcilable evidence is final.

Trespass.—Assault and battery. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STEIN & PLATT, attorneys for appellant.

M. SALOMON, attorney for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

There is a fair average of perjury in this case, but we can not tell on which side, and must accept the verdict of the jury as being based upon the truthful testimony.

August 6 or 7, 1892, the appellee bought from one Panoff a saloon, upon the contents of which, June 18, 1892, Panoff had given a mortgage to the appellant. The mortgage in terms included all wines, liquors and cigars that might be added to the stock, and the leasehold interest of Panoff in the premises.

What sort of leasehold interest Panoff had in the premises is not shown with any degree of certainty. If the appellant would justify under the mortgage of it, what it was should be proved.

The abstract does not show that the appellant pleaded in justification that Panoff had any leasehold interest, nor what replications were filed. *Olsen v. Upsahl*, 69 Ill. 273.

As to stock that might be added the mortgage was ineffectual. *Jones, Chat. Mtges.*, Sec. 138, cited with approval in *Borden v. Croak*, 131 Ill. 68; and as to stock on hand, kept for sale, the mortgage was void against a purchaser. *Deering v. Washburn*, 141 Ill. 153.

After an interview between the appellee and the president of the appellant in the forenoon of August 11, 1892, during which it does not appear that any unpleasantness occurred, the president gave the mortgage to a salesman of the appellant with directions to collect the money—\$450—and if he did not get the money, to get a constable and foreclose.

The salesman obeyed the instructions, got a constable and another man, went to the saloon, took possession of the place, and took away stock, furniture and fixtures. Thus far there is no dispute, and a clear case of trespass is made out. On a mortgage of the movables in the saloon, which in fact were moved the same day in wagons of the appel-

lant, the appellant had no right to turn the appellee out nor to take away any stock kept for sale, whether bought by the appellee from Panoff or brought in afterward, of which there is testimony as to part of the stock.

The general directions to foreclose a mortgage, which in terms covered the right of possession of the premises, left to the salesman the exercise of discretion as to taking possession of the premises. *Moir v. Hopkins*, 16 Ill. 313.

Why the president directed the salesman to get a constable, was a proper subject of inquiry before the jury. There was no legal process to be served. Only muscle to handle and wagons to transport the goods were necessary to the foreclosure.

The jury might well infer that, intending to turn out of doors, without any right shown so to do, a man in peaceable possession, the appellant thought resistance might be expected, and that "arms and the man" might be necessary to overcome such resistance.

In fact the constable shot the appellee, wounding him in the shoulder.

The appellee sued and has recovered \$1,500 against the appellant and the constable. The result is presumed to be right unless the record shows it to be wrong. No complaint is made of instructions given at the request of the appellee, or by the court without request, and in those, with four given at the request of the defendants below, all the law applicable to the case was before the jury.

The whole controversy is upon the evidence—conflicting and irreconcilable—and the verdict is final.

The damages are liberal, as the wounding was not severe, but the transaction was arbitrary and tyrannical.

The judgment is affirmed.

Albert Pick & Company v. Edward Slimmer.

1. ACCOUNT STATED—*Not Conclusive*.—An account stated is not conclusive upon the parties but simply affords a *prima facie* case.

2. SAME—*Power of a Corporation to Make*.—The president and sec-

Albert Pick & Co. v. Slimmer.

retary of a corporation are presumed to have authority to make and render a statement of account.

8. PROPOSITIONS OF LAW—*Must Not be Propositions of Fact.*—It is not error to refuse to hold, as a proposed proposition of law, what is in reality a proposition of fact.

Assumpsit, on an account stated. Appeal from the Superior Court of Cook County; the Hon. FARLIN Q. BALL, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STEIN & PLATT, attorneys for appellant.

Rendering the account in question while certain requirements of plaintiff's contract were unfulfilled would not constitute such an account stated as to afford ground for maintaining the suit in disregard of such requirements. *Phelps v. Hubbard*, 59 Ill. 79.

Even if the statement constituted an "account stated," such account would not be conclusive upon the plaintiff, but errors might be shown and corrected under the plea of general issue. 2 *Greenleaf on Evidence* (15th Ed.), Sec. 128; *Thomas v. Hawks*, 8 M. & W. 140; *Bouslog v. Garrett* 39 Ind. 338; *Vanderveer v. Statesir*, 39 N. J. L. 598; *Field v. Knapp*, 108 N. Y. 87.

And it is not necessary that this should be done by admitting the account stated and formally "surcharging" or "falsifying." The correctness of the items may be disputed under the general issue. *McKinster v. Hitchcock*, 19 Neb. 100; *Hodge v. Boynton*, 16 Ill. App. 524.

An account stated is not conclusive upon the parties but simply affords a *prima facie* case. The burden of proof is shifted but the correctness of items may still be attacked. *Gruby v. Smith*, 13 Ill. App. 43; *McKinster v. Hitchcock*, 19 Neb. 100; *St. Louis Co. v. Bank*, 8 Colo. 70.

Even when the circumstances are such that it would be improper to inquire into the items if the settlement of the account were admitted, yet it is proper to inquire as to the correctness of such items with a view to determining the probability of the respective claims where the rendering of the statement is disputed. *Coffee v. Williams*, 103 Cal. 550; *S. C.*, 37 Pac. Rep. 504; *Field v. Knapp*, 108 N. Y. 87.

RINGER, WILHARTZ & LOWENHAUPT, attorneys for appellee.

An account stated is conclusive, and courts will not permit an inquiry into the origin thereof where some act has been done or forborne in consequence of the accounting, and relying upon it, which would put the party claiming the benefit of it in a worse position than as though it had not been had. *Wharton v. Anderson*, 28 Minn. 301.

There is some confusion in the books as to the precise effect of a stated account upon the rights of the parties, but we are inclined to the opinion that it is only *prima facie* evidence of the correctness of the balance, and not conclusive upon it, unless in arriving at the agreed balance there has been some concession made upon items disputed between the parties, so that the balance is the result of a compromise, or some act has been done or forborne in consequence of the accounting, and relying upon it, which would put the party claiming the benefit of it in a worse position than as though it had not been had, so as to bring the case within the principles of an estoppel *in pais*. A stated account, not affected by such new consideration or estoppel, may be impeached for mistake or error in law or in fact, with respect to the items included in it, or for omission of items. *Perkins v. Hart*, 11 Wheat. 237; *Hardin v. Gordon*, 2 Mason, 562; *Thomas v. Hawks*, 8 Mees. & W. 140; *Wiggins v. Burkham*, 10 Wall. 129; *Lockwood v. Thorne*, 18 N. Y. 285; 1 Story Eq. Jur. 524; 2 Chitty on Contracts, 962; *Warner v. Myrick*, 16 Minn. 91; *Wharton v. Anderson*, 23 Minn. 301.

Where parties have settled and stated their accounts with one another, each is bound thereby, unless he can furnish clear proof of fraud or mistake. *Neff v. Wooding*, 83 Va. 432; *Weed v. Dyer*, 53 Ark. 155; *Frankel v. Wathen*, 58 Hun, 543; *Ware v. Manning*, 86 Ala. 238; *Powell v. Heisler*, 16 Oreg. 412; *Hawley v. Harran*, 79 Wis. 379; *Moscowitz v. Lemp*, Ar. 12 S. W. Rep. 781.

In action on a stated account, it is not necessary to prove the items of the original account, nor can they be inquired into or surcharged, except for some fraud, error or mistake, which must be set forth in the pleadings. *Auzerais v. Naglee*, 74 Cal. 60; *Devecmon v. Shaw*, 69 Md. 199.

Albert Pick & Co. v. Slimmer.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit upon an alleged account stated made in settlement of services rendered by appellee to appellant.

The statement was in writing, and was prepared by the secretary of appellant and given to appellee. It is as follows:

"Albert Pick, Pres. Abe Bloch, Sec'y & Treas.

STATEMENT.

CHICAGO, May 1, 1896.

M Ed. Slimmer,
In account with ALBERT PICK & Co., successors to Pick
Bloch & Joel, Importers, Jobbers and Dealers
and Complete Outfitters of Bars,
Hotels and Restaurants.

199, 201 & 203 Randolph St.

Telephone, Main 1885.

Cr..... \$3,000.

Dr.

Drawings..... \$1,300.00

A. Lipman..... 63.75

\$1,363.75

By balance due..... \$1,636.25

May 8th—By cash..... 300.00

\$1,336.25

1896. Payable as follows:

May 13.....\$200.00

June 8..... 378.75

July 8..... 378.75

Aug. 8..... 378.75

Rec. \$200 May 19, '96.

Rec. 100 July 6, '96.

Rec. 200 Aug. 18, '96.

\$1,336.25

Appellee testified that it was given upon a settlement of accounts, and that the president of appellant promised to pay the balance therefrom appearing to be due to appellee,

the payments to be made by installments of the amounts, and at the times indicated upon the statement. In this appellee was corroborated by a Mr. Loser.

Appellant denied that the "statement" was anything more than a transcript from the ledger, and insisted that appellee should be charged with certain goods sold by him which had not been paid for, and also with certain goods charged to him upon the order of a third party.

Appellant sought to introduce evidence concerning what was said when appellee was hired as to uncollectible accounts for goods he might sell.

Upon the trial appellant desired to show the conversation had with appellee when the statement was made, that appellant had claims against appellee growing out of his contract of employment by it; also, what the terms of the contract under which appellee was hired were.

The president of appellant corporation testified that it had claims against appellee for goods sold and delivered, and also what such claims are. That these claims arose subsequent to the making of the statement did not appear; and appellant also wished to introduce evidence showing the terms under which appellee entered its service.

Such evidence was properly rejected.

Appellee's suit was upon an account stated, and upon nothing else. If there were no stating of an account, then appellee had no case.

What the terms of the hiring of appellee were, and what claims appellant had against him when the alleged statement was made, was immaterial.

If there were a statement and if appellee had produced it in evidence, it could be attacked only for fraud or mistake.

There was no attempt to show either fraud or mistake in the making of the alleged stated account.

An account stated is not conclusive upon the parties; it does afford a *prima facie* case. Gruby v. Smith, 13 Ill. App. 43; McKinster v. Hitchcock, 19 Neb. 100; St. Louis Co. v. Bank, 8 Colo. 70; Vandemeer v. Statesir, 39 N. J. Law, 593; Clarke v. Marbourg, 33 Kansas, 471.

The court held all the propositions of law submitted by appellant, except the following:

“That the declarations and statements alleged to have been rendered by various officers of the corporation to the plaintiff in this case would not constitute an account stated as between the plaintiff and the defendant corporation.”

In refusing to hold this there was no error; it was not a proposition of law, but of fact.

The court found the issues for the plaintiff, and assessed the plaintiff's damages at the sum of eight hundred and thirty-six dollars and twenty-five cents.

The court thus, upon conflicting testimony, found that there was an account stated, as testified by appellee.

That when the account was stated the hiring and service of appellee had come to an end is undisputed. The case is, therefore, not like that of *Phelps v. Hubbard*, 59 Ill. 79, in which there had been only a partial performance.

The president and secretary of appellant are presumed to have had authority to make and render the statement in question.

The judgment of the Superior Court is affirmed.

70	363
171s	602

Standard Brewery v. Hales & Curtis Malting Company.

1. *CASE—Where the Action Lies.*—The action of case lies only for the breach of such duties as the law implies from the existing relations of the parties, whether such relations have been established with or without the aid of a contract; but if created by contract it is no objection to the action that the performance of the duty in question has been expressly stipulated for if it would have existed by reason of such relations without stipulation

2. *SAME—Where the Action Lies.*—A malting company received a quantity of barley from a brewing company under a contract to malt the same and to redeliver the same to the said brewing company. The malting company malted the barley but failed to deliver the same according to the terms of the contract. After a demand was made for the delivery of the malt, it was destroyed by fire. *It was held*, that an action of case would lie for the value of the malt.

VOL. 70.] Standard Brewery v. Hales & Curtis Malting Co.

8. LEGAL OBLIGATIONS—*When Not Varied by Contract.*--When language is used in a contract which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it.

4. BAILMENTS—*Loss of the Property by the Bailee.*—In an action against the bailee for the loss of the property bailed, if the bailee proves that the loss was occasioned by fire, the burden of proof is shifted to the bailor to show the negligence or fault of the bailee.

Trespass on the Case, for loss of goods by a bailee. Appeal from the Circuit Court of Cook County; the Hon. FRANCIS ADAMS, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STEIN & PLATT, attorneys for appellant.

W. A. FOSTER, attorney for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

Subsequent to the commencement of this action the name of Bemis & Curtis Malting Company was changed to that of the appellee. By its former name the appellee and the appellant entered into a contract in writing as follows:

“CHICAGO, September 9, 1893.

This agreement made this day by and between The Standard Brewing Co. and the Bemis & Curtis Malting Co., both corporations of Illinois, city of Chicago, wherein it is agreed on the part of said Standard Brewing Company to furnish, during the coming malting season, to the said Bemis & Curtis Malting Company, 50,000 bushels of barley to be malted, and to pay to the said Bemis & Curtis Malting Company the sum of fifteen cents per bushel for malting the said barley. The Bemis & Curtis Malting Company on their part agree to receive the said barley from any railroad in Chicago, haul the barley, pay the switching charges to their plant, store and malt the said barley in the best manner possible, deliver the malt to the said Standard Brewery Co. at their brewery, corner of 12th and Campbell avenue, all for

Standard Brewery v. Hales & Curtis Malting Co.

and in consideration of the sum of fifteen cents per bushel, as above stated. The said brewing company may increase the amount to 60,000 bushels at their option.

BEMIS & CURTIS MALTING COMPANY,
By BURTON F. HALES, President.
THE STANDARD BREWERY,
By AUGUST J. DEWES, President."

In pursuance of such contract, there was received by the appellee on different days between the making of the contract and December 12, of the same year, 27,847 bushels and thirty-four pounds of barley; and it was stipulated that on January 15, 1894, a demand was made on the appellee by the appellant "for 30,000 bushels of the malted barley."

All of the barley that had been received by appellee was malted prior to January 12, 1894, but none of it had been delivered to the appellant. On January 12, 1894, a fire occurred in the malt house of appellee, where the malted barley was contained, and it was destroyed.

This suit followed, and resulted in a verdict and judgment for the defendant, appellee here.

The action was on the case, in trover, and not in assumpsit upon the contract.

"Case lies only for the breach of such duties as the law implies from the existing relations of the parties, whether such relations have been established with or without the aid of a contract; but if created by contract, it is no objection to the action that the performance of the duty in question has been expressly stipulated for, if it would have existed by reason of such relations without such stipulation." *Nevin v. Pullman P. Car Co.*, 106 Ill. 222, p. 236; *Kinnare v. City of Chicago et al.* (p. 106, this volume).

The duty of the appellee to return to appellant the barley when malted would have been implied by law by reason of the relation of the parties, and did not depend upon the fact that it was expressly stipulated for, and, therefore, case was an appropriate remedy, though a concurrent one with assumpsit. *Nevin v. P. P. Car Co.*, *supra*.

The written contract not having provided when the barley

should be returned, left the duty just where the law itself would have left it if there had been no express agreement. That is to say, the express contract did not enlarge appellee's duty in that regard beyond what the law imposed.

"When language is used which does no more than express in terms the same obligation which the law raises from the facts of the transaction itself, the party using the language is no further bound than he would have been without it." *Young v. Leary*, 135 N. Y. 569.

In other words, in such a case the common law liability is not enlarged because the contract is an express one.

The action being in case, and therefore one in which there could be no recovery, though the contract be express, except for the breach of a duty that the law implies, whatever would in law excuse the breach of the implied duty would excuse the appellee from a breach of its express duty. And this is so, notwithstanding if the action had been in assumption upon the alleged breach the appellee might not have been excused.

The written agreement between the parties needs but to be read to have it appear that appellee having received the barley from the appellant undertook, by agreeing to redeliver it, no greater duty than the law, without any agreement, would have imposed.

And our Supreme Court, in *Steele v. Buck*, 61 Ill. 343, has clearly pointed out the distinction between an obligation or duty imposed by law, and that created by covenant or act of the party, and has stated what will excuse a party in the one case and not in the other.

The liability of the appellee in the case at bar, being the same as the law would impose upon it if it had made no agreement concerning a redelivery of the barley, and the jury having settled by their verdict that appellee used ordinary care and diligence in its safe keeping, and that its loss and destruction was not by reason of appellee's negligence, we see no occasion to interfere with such verdict. The evidence shows conclusively to the mind of any reasonable person that the fire was one that could not be accounted for,

Malcolm v. Shanklin.

and could not have been prevented upon any theory of ordinary prudence and diligence, and such degree of prudence and diligence was all that was required of the appellee.

Under the rule applicable to bailments of such character, it is not necessary that the bailee should acquit himself of all negligence. "If he proves the loss to have occurred from some cause which *prima facie* exonerates him, it is sufficient. Thus, if he proves the loss was occasioned by * * * fire, * * * the burden is again shifted to the bailor to prove the bailee's negligence." 3 Am. & Eng. Ency. of Law (2d Ed.), 751; Russell v. Koehler, 66 Ill. 459; Story on Bailments, Secs. 36 and 437; Edwards on Bailments, Sec. 425.

Our conclusion upon this branch of the case renders a consideration of other argued defenses to the action unnecessary. There was no error in the instructions, nor in the admission or rejection of evidence.

The point is made by the appellant that there should have been a recovery to the extent, at least, of the value of so much of the barley as was not actually destroyed, but was "soaked with water and mixed with cinders," and was taken away by the insurance companies. But there was not sufficient evidence to base any recovery for such "muck" upon.

Upon the record no error is shown, and the judgment will be affirmed.

Fremont B. Malcolm v. Robert F. Shanklin.

1. **SHORT CAUSE CALENDAR**—*Motion to Strike Cause From.*—Where a cause has been placed upon the short cause calendar without dissent, and trial by jury waived, a motion thereafter to strike it from such calendar because no replication to the defendant's plea has been filed, is properly overruled.

Assumpsit, on a guaranty. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

This was an action in assumpsit by appellee against appellant to recover upon the guaranty by the latter of a note for six hundred and fifty dollars, made to the former by William Mitchell and Nellie D. Driver, which note was due December 1, 1895. After a plea of the general issue, with affidavit of meritorious defense, October 19, 1896, both parties appeared; by agreement the case was passed, jury waived, and cause set for trial on November 2, 1896, upon the short cause calendar. No replication was ever filed. Rule 18 of the Circuit Court provides that, "no cause shall be noticed for trial until the same is at issue."

The counsel of defendant who had filed pleas, being ill, other counsel were substituted, who moved to strike the cause from the short cause calendar, because the suit was not at issue when placed on such calendar. This being denied, counsel asked for a few hours time in which to prepare a special plea; this was denied, and upon trial judgment for the plaintiff for the amount of the note was rendered.

DAVID J. WILE, attorney for appellant.

PADEN & GRIDLEY, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The cause having been placed upon the short cause calendar without dissent, and trial by jury waived, the motion thereafter made to strike the cause from the calendar because no replication to the defendant's plea had been filed, was properly overruled. *Wheatley, Buck & Co. v. Chicago Trust & Savings Bank*, 64 Ill. App. 612.

The cause was originally set for trial on November 2d. Upon that day there was no court. November 9th the case was continued to November 16th on account of the illness of defendant's attorney. November 16th there was no trial of cases on the short cause calendar. November 23d, defendant, after his motion to strike from the calendar had

been overruled, asked for time in which to file a special plea.

We can not say that the court in refusing to give time for the filing of a special plea, abused its discretion. The filing of such plea might have necessitated a further continuance of the cause. No sufficient reason for not having before presented such plea was shown.

The judgment of the Circuit Court is affirmed.

Abraham Bernstein v. Leon Zolotkoff and Fannie Zolotkoff.

1. CHATTEL MORTGAGES—*Household Goods Sold on the Installment Plan*.—The act of June 5, 1889, to regulate the foreclosure of chattel mortgages on household goods, etc., has no application to the sale of furniture by regular dealers on the installment plan.

Replevin.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Mr. Presiding Justice SHEPARD dissenting. Opinion filed June 14, 1897.

BLUM & BLUM, attorneys for appellant.

ZOLOTKOFF & ZOLINE, attorneys for appellees.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

December 5, 1891, the appellant, a regular dealer in furniture on the so-called installment plan, sold to the wife—then Fannie Ogers—furniture, for which he took her nineteen promissory notes, payable at intervals extending over two years, secured by chattel mortgage on the same furniture.

Thereafter she married the appellee Leon, and December 4, 1893, the appellees gave to the appellant a new mortgage on the same furniture to secure the unpaid portion of

the original debt, to be paid at like intervals—also fixed by promissory notes.

December 4, 1894, by a suit before a justice of the peace, the appellant replevied the goods. By appeal the case got into the Superior Court, where it was dismissed for want of jurisdiction.

Whether the supposed want of jurisdiction was based upon a construction of an act to regulate the foreclosure of chattel mortgages, etc., approved June 5, 1889, that "the so-called installment plan" did not permit a transfer of the title and possession of the goods sold, and a mortgage back to secure the price; or that the second mortgage in which the husband—who did not purchase—joined, was an abandonment of the "installment plan;" or why the court held it had not jurisdiction, does not appear.

Until the appellant had been paid the price of his furniture, however many the mutations through which his security for that price had passed, he was in relation to it, and the security for it, exempt from the enacting part of the act cited; and whether he sold upon a contract which in terms called for payment by installments, or by any other method which in fact made the price payable by installments, the result is the same and he is within the exemption of the proviso.

The original affidavit upon which the writ of replevin was sued out was sufficient. No amendment was necessary.

The refusal to permit the amendment, therefore, need not be considered.

The judgment is reversed and the cause remanded for further proceedings not inconsistent with this opinion. If it should appear that the appellant replevied any goods not sold by him to the wife at the time of the first mortgage, then only as to those goods his suit would fail.

MR. PRESIDING JUSTICE SHEPARD dissents.

Knefel v. Swartz.

Paul Knefel v. David G. Swartz.

1. APPELLATE COURT PRACTICE—*Grounds for Reversal Must be Shown by the Abstract.*—Whatever the appellant relies upon for a reversal of the judgment must be shown by the abstract.

70a	371
78	552
78	555
70a	371
94	247
70	371
98	1 4

Assumpsit, on a guaranty of a promissory note. Appeal from the Circuit Court of Cook County; the Hon. THOMAS G. WINDES, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

JOHN KNEFEL, attorney for appellant.

OLIVER & MECARTNEY, attorneys for appellee.

MR. JUSTICE GARY DELIVERED THE OPINION OF THE COURT.

The abstract does not show what was the declaration upon which the appellee recovered, nor upon what evidence, on an *ex parte* trial.

It is impossible to tell from the abstract whether the affidavits presented on a motion for a new trial, have any relation to the cause of action upon which the recovery was had.

In such a case we can not say that the court erred in not granting a new trial.

Whatever the appellant relies upon for reversal of the judgment he must show by his abstract. *City Electric Ry. v. Jones*, 161 Ill. 47; *Wabash R. R. v. Smith*, 58 Ill. App. 419; *Newman v. Jacobson*, 67 Ill. App. 639.

The judgment is affirmed.

Calumet Electric St. Ry. Co. v. Frederick Lynholm.

1. NEGLIGENCE—*Absence of Lights Upon Electric Cars.*—Headlights should be placed upon electric cars on dark nights so as to enable the motorman to see wagons in time to prevent collisions.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge,

presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

This appeal is brought from a judgment for \$500 rendered against the appellant in the Superior Court of Cook County in favor of Frederick Lynholm.

On the night of September 3, 1894, appellee was driving eastward on 95th street; the night was dark and it rained intermittently.

Appellant maintained a street car line with two tracks on 95th street. On the south or east-bound track appellee was driving a one-horse wagon when he was overtaken by an east-bound car. Appellee being signaled by the gong and hallooming of the motorman to turn out, did so in the only way he could, viz., by going on to the north track.

At this time a west-bound car was approaching from the east, about two blocks away; this car struck the wagon of appellee, and he being thrown forward, was caught in the arms of the motorman and set down on the front platform of the car.

JUDSON F. GOING, attorney for appellant.

CASE & HOGAN and MUNSON T. CASE, attorneys for appellee.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

We quite agree with the opening sentence of appellant's argument, that "There was no reason, from appellee's own statement, why he should have been run into."

Why did appellant, without reason, run into him? His right to be upon the track was the equal of appellant's.

Even had he willfully remained upon the track for the purpose of obstructing the way, appellant would have had no right to run into him in the manner it did.

The night was dark, but there should have been such

Kinnare v. M. C. R. R. Co.

headlight upon the car as would have enabled the motorman to see the wagon in time to prevent a collision. The motorman at all events should have run his car with reference to the distance he could see, and so as not to collide with a team or person walking upon the track.

Whether, after the passage of the east-bound car, there had been sufficient time for appellee to return to that track, and whether he exercised ordinary care, were questions of fact for the jury.

The damages are not excessive.

The jury was fairly instructed, and the judgment of the Superior Court is affirmed.

**Frank T. Kinnare, Adm'r, etc., v. The Michigan Central
R. R. Co.**

1. **BILLS OF EXCEPTIONS.**—*Must Show That They Contain all the Evidence.*—If a bill of exceptions does not show that it contains all of the evidence a court of review will presume that the decision of the lower court, which could be justified, was justified by the evidence not shown in the bill of exceptions.

Trespass on the Case, death from negligent act. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

B. M. SHAFFNER, attorney for appellant.

It will be noticed that the court trying the cause certifies, "that the foregoing witnesses (naming them), were all the witnesses produced by either party to the suit, but that the foregoing was not all the evidence of such witnesses."

It is not necessary that a bill of exceptions should contain all the evidence where a question of law is involved, or where it is decided to question the decision of the court in giving or refusing instructions. In such case it is sufficient that the bill of exceptions states that the evidence tended

to prove certain facts. In the case at bar, upon motion of counsel for appellee, the court instructed the jury to find the defendant not guilty; in effect, a demurrer to appellant's evidence, which not only admits the truth of the facts testified to, but all inferences logically flowing therefrom. See *Schmidt v. O. & N. W. Ry. Co. et al.*, 83 Ill. 412; *Nason v. Letz*, 73 Ill. 371.

WINSTON & MEAGHER, attorneys for appellee; FREDERICK R. BARCOCK of counsel.

In the absence of a certificate by the judge before whom the case is tried, that the bill of exceptions contains all the evidence introduced upon the trial, the court is bound to presume that there was sufficient evidence to sustain the judgment of the court below. *Oehmen v. Thurnes*, 51 Ill. App. 435; *Clough et al. v. Kyne et al.*, 51 Ill. App. 120; *Keating et al. v. Stebbins*, 22 Ill. App. 567; *Redner v. Davern*, 41 Ill. App. 245; *Reid v. Flanders*, 62 Ill. App. 106; *Thompkins v. Mann*, 6 Ill. App. 171; *Robertson v. Morgan*, 38 Ill. App. 137; *Fuller v. Bates*, 6 Ill. App. 442; *Ballance v. Leonard*, 37 Ill. 43; *Buckland v. Goddard*, 36 Ill. 206.

It is a familiar doctrine that appellate tribunals will indulge in all reasonable presumptions in favor of the action of the court below, in order to sustain the judgment or decree reviewed. *Schmidt et al. v. Braley*, 112 Ill. 48; *Johnson v. Glover*, 19 Ill. App. 585; *Redner v. Davern*, 41 Ill. App. 246; *Board of Trustees v. Misenheimer*, 89 Ill. 151.

Where there is no bill of exceptions, only such questions as arise on the pleadings in the record, aside from the bill of exceptions, can be considered on the appeal. *Stern et al. v. The People*, 96 Ill. 475.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This action was brought by appellant, as administrator of the estate of B. F. Schmidt, deceased, to recover damages for negligently causing the death of said Schmidt.

At the close of the plaintiff's case, the court, at the request of the defendant, peremptorily instructed the jury to return a verdict of not guilty.

The only question of law presented by the record is whether the court erred in giving such instruction, and that, in turn, depends upon whether the evidence failed to make a case for the jury to pass upon.

The bill of exceptions affirmatively shows that it does not contain all the evidence that was heard at the trial.

It is therein certified by the trial judge, as follows:

"The foregoing witnesses, Louis Schmidt, James Patton, Gustav Mehlschmidt and H. F. McLean were all the witnesses produced by either party to the suit, upon the trial thereof, but the foregoing is not all the evidence of said witnesses."

And the point that with less than all the evidence before us, we can not determine a question of law that depends upon the evidence, is insisted upon by the appellee, and must prevail.

"It has always been the law of this State that if a bill of exceptions did not state that it contained all the evidence, a court of review would presume that the decision of the lower court, which could be, was justified by the evidence not shown, if that shown was not sufficient," was the language of this court in *Garrity v. Hamburger Co.*, 35 Ill. App. 309, quoted with approval by the Supreme Court in the same case, 136 Ill. 499, where it was added: "We think the Appellate Court took a substantially correct view of the matter, since it affirmatively appeared, from the bill of exceptions, that evidence which probably bore on the question in issue was introduced at the hearing, but was not copied into the bill of exceptions." See also *Goodwillie v. City of Lake View*, 137 Ill. 51; *Buckland v. Goddard*, 36 Ill. 206; *Ballance v. Leonard*, 37 Ill. 43; *James v. Dexter*, 113 Ill. 654.

This court has had occasion many times to announce the rule, some of the later cases being *Poppers v. Hynes*, 60 Ill. App. 448; *Reid v. Flanders*, 62 Ill. App. 106; *Clough v.*

Kyne, 51 Ill. App. 120; Redner v. Davern, 41 Ill. App. 245; and the early case of Tompkins v. Mann, 6 Ill. App. 171.

It follows, necessarily and emphatically, that an assignment of error in law which rests wholly upon the evidence can not be considered upon but a part of the evidence being before us.

The judgment of the Circuit Court is affirmed.

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**Herman Z. Mallen et al. v. Benjamin F. Langworthy,
Receiver, etc.**

1. **MUTUAL INSURANCE COMPANIES—When Members Can Not Question Assessments in Case of Insolvency.**—An assessment made by a court upon the members of an insolvent mutual insurance company can not be questioned by a member in a suit against him by the receiver for the purpose of collecting such assessment, upon the ground that such member has not had his day in court, and ought not to be bound by a judgment or decree to which he was not a party or privy.

2. **SAME—Cancellation of Policies and Subsequent Insolvency.**—While the cancellation of a policy of mutual insurance ends the liability of the policy holder as to future losses and expenses of the company, the relation of the assured to the insurance company remains for the purpose of an assessment for prior losses and expenses of the assessment until the liability of the assured to the extent of his premium or deposit note has been discharged, and when the assessment is made by the court, the court must, in the nature of things, have a reasonable discretion in respect to the expenses to be provided.

3. **TRIAL BY JURY—Directing a Verdict for the Plaintiff.**—A defendant in a suit upon an assessment is not necessarily deprived of his constitutional right of trial by jury because the court peremptorily directs a verdict for the plaintiff for the amount of such assessment.

4. **VARIANCE—When Immaterial.**—A technical variance in a single respect between the declaration and the proof concerning an immaterial matter in the suit is of no legal consequence.

Assumpsit, for an assessment. Appeal from the Circuit Court of Cook County; the Hon. FRANK BAKER, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

WILLIAM H. TATGE and WILLIAM A. DEYL, attorneys for appellants.

FARSON & GREENFIELD, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This was a suit brought by the receiver of the Mutual Fire Insurance Company, of Chicago, against the appellants, copartners, doing business as H. Z. Mallen & Co., to recover an assessment made in a proceeding for the purpose of winding up the affairs of said company, upon their premium or deposit note, given to the insurance company at the time they took out a policy of fire insurance in said company.

Except in particulars applicable to the different transactions, the note was like the one set forth in the statement of facts in *Rand, McNally & Co. v. M. F. Ins. Co.*, 58 Ill. App. 528, and was for five times the amount of the annual premium that was paid when the policy was issued.

And the assessment in question was ordered in the same proceedings stated in that case.

It is urged that because the appellants were not parties by name to the proceedings in which the receiver was appointed and the assessment was made, the transcript of such proceedings was improperly admitted in evidence, upon the ground that appellants have never had their day in court, and that no one should be bound by a judgment or decree to which he was not a party or privy.

We have substantially answered that proposition in the *Rand, McNally & Co.* case, above cited. See also *Ward v. Farwell*, 97 Ill. 593; *G. W. Tel. Co. v. Gray*, 122 Ill. 630; *Parker v. Stoughton Mill Co.*, 91 Wis. 174; *Mutual F. Ins. Co. v. Phoenix Furn. Co.*, 66 N. W. Rep. (Mich.) 1095; *Hawkins v. Glenn*, 131 U. S. 319; *Lycoming F. Ins. Co. v. Langley*, 62 Md. 196.

An objection is made that the assessment included items of losses and expenses for which appellants were not liable. If we were to assume that such a question could be raised collaterally, we should be obliged, from a careful analysis of all that appears to us by the abstract of the lengthy assessment proceedings shown in the record, to hold that the objection is not well founded and ought not to be sustained.

What is said in *Seamans v. The Millers Mut. F. Ins. Co.*, 90 Wis. 490, on p. 496, in referring to *Davis v. Shearer*, 90 Wis. 250, where the general subject was examined, is applicable here.

While the cancellation of a policy of mutual insurance ends the liability of the policy holder as to future losses and expenses of the company, the relation of the assured to the insurance company still remains for the purpose of an assessment for prior losses and expenses of the assessment, until the liability of the assured to the extent of his premium or deposit note has been discharged; and where the assessment is made by the court, the court must, in the nature of things, have a reasonable discretion in respect to the expenses to be provided for. We fail to find that appellants have been assessed for losses occurring subsequent to the termination of their policy, or prior to its issuance, or for any more than their due proportion of the expenses fixed in the exercise of a reasonable discretion by the court that ordered the assessment.

There is no force in the contention that appellants were deprived of their constitutional right to a trial by jury because the court peremptorily directed a verdict for the appellees for the amount of the assessment against appellants.

The documentary matter by which that assessment was made to appear, was very voluminous, and having been offered in evidence, the directing of a verdict for the amount so made to appear, was no more than telling the jury what the legal effect was of such record, and was no more erroneous than to instruct a jury in a proper case to bring in a verdict for the amount of a promissory note that had been sued upon.

It is also urged that there was a variance between the declaration and the proof.

There was a technical variance in a single respect between the declaration and the proof, but it was concerning an immaterial matter in this suit.

No error appearing, the judgment is affirmed.

Lindgren-Mahan Chemical Fire Engine Co. v. Revere Rubber Co. et al.

1. **RECEIVERS—Appointment of, Without Notice.**—A receiver for an insolvent corporation may be appointed without notice, when it is shown that notice can not be served upon the officers of such corporation.

Order Appointing a Receiver.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

JOHN G. CAMPBELL, attorney for appellant.

MORSE, IVES & TONE, attorneys for appellees.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

This appeal is from an interlocutory order appointing a receiver of "all the moneys, property, effects and choses in action of" the appellant corporation, "according to the prayer of the bill of complaint."

The bill was filed by appellees on behalf of themselves and such other persons as might join in and share the costs thereof, and alleged that the complainants were, severally, contract creditors of the defendant corporation to separate amounts aggregating \$1,208; that said corporation had, three days before the bill was filed, confessed a judgment in favor of Kelley, Maus & Company for \$15,500, an amount alleged to be far in excess of its indebtedness to said firm, and that under an execution issued upon said judgment on the day said judgment was confessed, all the stock, merchandise, goods and other tangible property of said corporation were levied upon by the sheriff, and that said corporation had no real estate; that said judgment and execution levy were pursuant to a conspiracy between said corporation and said Kelley, Maus & Company to save to the corporation some part of its assets; that said corporation had assigned

all debts and accounts due to it, but without stating to whom, for the purpose of putting the same beyond the reach of complainants and other creditors; that on the day of the levy of said execution said corporation discharged all the help employed by it in the conduct of the business for which it was organized, and wholly ceased to do business, and does not intend to resume the same, and that it is hopelessly insolvent and has permanently ceased to do business, and that certain of the stockholders of said corporation have not fully paid up their stock subscriptions.

The prayer of the bill was for a dissolution and winding up of the corporation, among other things, and for the appointment of a receiver to close up its affairs under the supervision of the court. There was no prayer that the receiver should take possession of any specific property, nor that he should exercise any powers except such as the court might deem to be expedient in the future, nor did the court, in its order appointing a receiver, give any such directions.

It was simply the case of the appointment of a receiver of an insolvent corporation which had ceased to do business leaving debts unpaid, and had nothing left to it in the way of tangible assets subject to execution.

The corporation, alone, appeals.

The order was entered without notice, but the court found that the complainant was unable to get service of notice for the appointment of a receiver upon the officers of the corporation, and the affidavits upon which such a finding were based justified the finding.

The case is very unlike that of *Craver and Steele Co. v. Whitman*, 62 Ill. App. 313. There the order was very broad. It affected third persons and property in their hands, and included the taking possession by the receiver of all property and assets in which the defendant "had, or has, any beneficial interest, wherever said assets or property may be found."

There is no such sweeping scope to the order under consideration. Here the receiver has only to close up the business and affairs of the corporation under the direction of the

Calumet Electric St. Ry. Co. v. Grosse.

court, and we will not assume that the court will permit any unjust deprivation of the rights of third persons by the receiver, nor interfere with the possession of property by third persons until after an adjudication of their rights.

The case seems to be one that comes clearly within that clause of the 25th section of the corporation act, which permits the filing of a bill to wind up a corporation when it has ceased to do business leaving debts unpaid, and we see no ground for the corporation to complain of the appointment of a receiver. Affirmed.

Calumet Electric St. Ry. Co. v. Charles Grosse.

1. **ELECTRIC WIRES—Duty in Locating.**—Where an electric wire is located upon an overhead structure and removed by several feet from all possibility of injuring any person who, in the exercise of his usual rights and duties upon a highway, may be in its vicinity, the proprietors of such wire are under no duty to protect it by an absolutely perfect insulation, so that no person, however extraordinary may be the rightful duties he is engaged in, will be injured through contact with it.

Trespass on the Case, for injuries from an electric wire. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed June 14, 1897.

JUDSON F. GOING and LOUIS G. KNIGHT, attorneys for appellant.

CLARK & CLARK, attorneys for appellee.

MR. PRESIDING JUSTICE SHEPARD DELIVERED THE OPINION OF THE COURT.

The appellee was a lineman engaged in stringing telephone wires for the Chicago Telephone Company upon its poles on Cottage Grove avenue, standing at or about the curb line, on the east side of said avenue.

The appellant operated its electric car line upon and in about the center of the same avenue. Its trolley wires were fed by span wires from insulated feed wires carried upon poles standing between the telephone poles and the east sidewalk. The two lines of poles were on substantially parallel lines, about fifteen feet apart. Both lines of poles were on the east side of the avenue, and the telephone poles stood not far from midway between the feed wire poles and the trolley wires, and were from five to ten feet higher than the feed wire poles. The arms of the telephone poles being higher than the span wires, it was necessary, in order to string the telephone wires taut, to get them across and above the span wires that reached across the street, from the feed to the trolley wires, between the successive telephone poles.

As we understand the method of doing the work, it was for appellee, acting as lineman, to proceed ahead and, taking hold of the telephone wire that reached from the last preceding telephone pole, across the feed wires to the coil of wire on the ground, to flop or swing it over the intervening feed wire pole, after which it would be taken by a man upon the next telephone pole and fastened, and so on to the next pole.

To an inexperienced person such a method speaks poorly for the ingenuity of those who employed it, but there is testimony that it was the only method then used in Chicago under like conditions.

The method pursued, whether precisely stated by us or not, was followed in the instance under consideration for the distance of about a mile and a half in safety, but then the telephone wire in some way came into contact with an uninsulated space in the feed wire, or at the point of connection between the feed wire and one of the span wires, and appellee received the shock and burns for which he was awarded the damages of \$1,000 in question.

The right to any recovery against the appellant in favor of the appellee, under all the circumstances of the accident, which we have stated only in most general respects, is at least doubtful.

Perhaps the most serious question in the case is that of the duty of the appellant to the appellee. The appellee was not in the employ of the appellant, or of any person under the appellant. There does not appear to have been any contractual relation between the telephone company, for which appellee was at work, and the appellant, providing in any way for the use of the feed wire by the telephone company. And in this connection, quite a serious question arises, whether without proof of authority to do so, the telephone company or its employees had the right, without being treated as trespassers, to drag their wires upon and across those of appellant in the manner pursued in this case, even though both companies were in rightful occupancy of the public street. But we need not press that inquiry at this time.

The wire from which the shock was received was upon an overhead structure, and removed by several feet from all possibility of injuring anybody, who might, in the exercise of his usual rights and duties upon a highway, be in its vicinity. The wire being so located, was the appellant under a duty to protect it by an absolutely perfect insulation, so that no person, however extraordinary might be the rightful duties he was engaged in, should be injured through contact with it?

The trial judge seems to have thought there was such a high degree of duty resting upon appellant, and at the instance of appellee he instructed the jury to that effect, as follows:

“3. The court instructs the jury that the business of distributing electricity on wires strung over the streets of the city of Chicago is a dangerous business, and the persons or corporations engaged in the same are held to the utmost degree of care and diligence in the construction and maintenance of its line of wire so as to make the same safe against accidents, so far as such safety can, by the use of such care and diligence, be secured.”

We will not by any present holding deny the high degree of care to be exercised by persons or corporations in the use

along the public highways of the powerful and secret agency of electricity, but under the circumstances of this case, where it was also shown that the defect in the insulation was not discernible from below, and could only be seen by a close inspection at the very point of imperfection, we can not assent to the proposition, as one of law, that the "utmost degree of care and diligence"—that is to say, such a degree of care as might be observed by the exercise of everything that human ingenuity could suggest—was required. And because such instruction, under the facts of this case, is unsupported by authority, and is contrary to what we conceive to be the law, and was probably prejudicial to the appellant, we are constrained to reverse the judgment and remand the cause for another trial.

MR. JUSTICE GARY.

I think the court should have given the instruction asked by the appellant to find for the defendant, for the reason that no duty was incumbent upon the appellant to furnish conveniences to string the telephone wires, and that therefore the judgment should be reversed without remanding.

Suburban Construction Company et al. v. E. E. Naugle et al.

1. **SPECIFIC PERFORMANCE**—*Will not be Granted at the Request of a Party when it Can Not be Enforced Against Him.*—A contract to be specifically enforced by the court must be mutual; that is to say, such that it may be enforced by either of the parties against the other, and it is immaterial what constitutes the want of mutuality, whether resulting from personal incapacity, from the nature of the contract, or from any other cause; whenever it is ascertained that the contract is incapable of being enforced against one of the contractors, he will be equally incapable of enforcing it against the other party.

2. **SAME**—*Of Contracts Including a Series of Acts.*—Courts will not undertake to enforce specific performance of contracts extending over considerable time, and including a series of acts, essential to a complete performance; and among such contracts, non-enforceable specifically, railroad building contracts are included.

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76	691
70	384
86	544
70	384
94	4309

70	384
105	*500
70	384
10	* 55

Suburban Construction Co. v. Naugle.

3. **INJUNCTIONS—On Bills for Specific Performance.**—Where the object of a bill is to enforce specific performance of a contract, and that object can not be attained, a writ of injunction, ancillary thereto, will usually fall with the bill; for a court will not say we are unable to decree a specific performance of the contract, but we will restrain from actions which are inconsistent with it.

4. **SAME—Issuance of, Without Notice.**—To avoid the necessity of notice of an application for an injunction, the complainant must show such facts by sworn statement as will lead the court to the conclusion that the rights of complainant will be unduly prejudiced if notice be given before the writ issues. And a statement that "complainants fear that unless restrained immediately and without notice, said parties * * will enter into some contract or make some fraudulent settlements whereby the interests of complainants * * * will be greatly diminished and injured," is too vague and indefinite to warrant a court in concluding that an injunction should issue without notice.

Specific Performance and Injunction.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded with directions. Opinion filed July 15, 1897.

KNIGHT & BROWN and GREEN, ROBBINS & HONORE, attorneys for appellants.

This injunction, being but ancillary to the ultimate relief—specific performance—can not be sustained if a case for specific performance is not made. *Gelston v. Sigmund*, 27 Md. 334, 343; *Baldwin v. Society*, 9 Simons, Ch. 394; *Allen v. Burke*, 2 Md., Ch. 534; *Hovnanian v. Bedessern*, 63 Ill. App. 353; *Fargo v. N. Y. & N. E. R. R. Co.*, 23 N. Y. Supp. 360; *Ross v. Union Pac. R. R. Co.*, *Woolworth*, 26.

The remedy by specific performance must be mutual, and in the present case will not be decreed in favor of appellees, unless equity would decree specific performance of the contract by appellees upon a bill filed by the Suburban Construction Company. *Ross v. Union Pac. R. R. Co.*, *Woolworth*, 26; *Cooper v. Pena*, 21 Cal. 403, 410; *Marble Co. v. Ripley*, 10 Wallace, 339; *Lancaster v. Roberts*, 144 Ill. 213; *Mastin v. Halley*, 61 Mo. 196, p. 200; *Blackett v. Bates*, L. R., 1 Ch. App. Cas. 117.

It is a firmly established limitation upon the jurisdiction to decree specific performance that it will not be

decreed of a contract (like the one at bar), requiring the direct superintendence of the court, nor where the contract or duties to be performed are continuous. This rule has received emphatic application, especially in cases involving the construction or operation of a railroad, as will appear in the following cases: *Ross v. Union Pacific Railway Co.*, Woolworth, 26; *Texas Railway Co. v. Marshall*, 136 U. S. 407; *Oregonian Ry. Co. v. Oregon Navigation Co.*, 11 Sawyer 33; *Peto v. Brighton Ry. Co.*, 1 Hemming & Miller, 468; *South Wales Railroad Co. v. Wythes*, 1 Kay & Johnson's Rep. 186; *Grape Creek Coal Company v. Spellman*, 39 Ill. App. 630; *Harley v. Sanitary District*, 54 Ill. App. 337; *Danforth v. Phil., etc., Ry. Co.*, 30 N. J. Eq. 12; *Blackett v. Bates*, Law Reports, 1 Ch. App. Cas. 117; *Johnson v. Shrewsbury Ry. Co.*, 3 DeG. M. & G. 914; *Atlanta, etc., R. R. Co. v. Speer*, 32 Ga. 550; *Blanchard v. Detroit, etc., R. R. Co.*, 31 Mich. 43; *Powell Coal Company v. Taft Vale Ry. Co.*, L. R. 9 Ch. App. Cas. 331; *Port Clinton R. R. v. Cleveland, etc., R. R.*, 13 Ohio State, 544; *Fargo v. N. Y. & N. E. R. Co.*, 23 N. Y. Supp. 360.

HATCH & RITSHER, attorneys for appellees.

The jurisdiction of equity to interfere by way of injunction is not confined to cases in which specific performance can be decreed, but is exercised whenever it can operate to bind men's consciences to a true and literal fulfillment of their agreement. Woodman, *Specific Performance of Contracts*, Sec. 109, 110, 112, 114; *W. U. Tel. Co. v. U. P. Ry. Co.*, 3 Fed. Rep. 423; Pomeroy on *Specific Performance*, Sec. 24, 25, 310, 311 and 312; *Lawrence v. Saratoga Lake Ry. Co.*, 36 Hun, 467; *Chi., etc., R. R. Co. v. N. Y., etc., R. R. Co.*, 22 Am. & Eng. R. R. Cases, 270; *Singer Sewing Machine Co. v. Union Button-Hole & Embroidery Co.*, 1 Holmes 253; *Bumgardner v. Leavitt*, 12 Lawyer's Rep. Ann. 776.

A glance at the more recent decisions in suits brought to enforce or to prevent the violation of contracts shows that the trend of decisions in recent years is to establish the

Suburban Construction Co. v. Naugle.

doctrine that, no matter how much of personal supervision specific performance may seem to entail on the court, a court of equity will not permit injustice to be done, but will command performance by general decree, and will restrain violation by general injunction, relying on its inherent powers to punish contempt and to enforce its mandates and defying the attempt of the wrongdoer to put himself where the hand of a court of equity can not reach. *Prospect Park & C. I. R. R. Co. v. Coney Island & B. R. R. Co.*, 144 N. Y. 152.

The more recent adjudications of the United States Supreme Court are a direct refutation of the contention of appellants on this point. *Union Pac. R. Co. v. Chicago, R. I. & P. R. Co.*, 163 U. S. 564; *Joy v. St. Louis*, 138 U. S. 1; *Franklin Tel. Co. v. Harrison*, 145 U. S. 459; *Denver & R. G. Ry. Co. v. Alling*, 99 U. S. 463; *Memphis & L. R. R. Co. v. Southern Ex. Co.*, 117 U. S. 1.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order of the Circuit Court granting an injunction.

Appellees, as contractors, had undertaken by their agreement of November 28, 1896, to construct, equip for operation by electricity, and to operate for the period of two years, a certain system of railroad known as the Suburban Railroad Company. By the same agreement the Suburban Construction Company, one of appellants, undertook to pay appellees for such construction, services, etc., in stocks and bonds of the railroad to be constructed. Certificates of the stock were to be issued and delivered to appellees in accordance with the terms of the agreement, by S. P. Shope, as trustee.

The bonds, executed by the Suburban Railroad Company, were to be secured by a deed of trust to the Chicago Title & Trust Company. Both stocks and bonds were to be delivered to appellees as work progressed.

The bill alleges that certain of appellants, pretending to act for the Suburban Construction Company, have declared

that this contract has been abrogated by said Suburban Construction Company; and prays for the following relief:

"That the said defendants, and each of them, their agents, servants and attorneys, may be perpetually enjoined from interfering with, obstructing or preventing the performance of the contract of your orators with the Suburban Construction Company, dated November 28, 1896, and from interfering with, obstructing or preventing the certifying, issuing and delivery of the bonds of the Suburban Railroad Company, and the beneficial certificates issued, and to be issued, by S. P. Shope, trustee, to your orators, in accordance with the terms of said contract of November 28, 1896, and from interfering with, obstructing or preventing said S. P. Shope, trustee, from carrying out and executing said trust agreement of March 16, 1896, and that said Charles S. Leeds, Herbert F. Hatch, Frank E. Hall, A. B. Leeds, C. C. Chandler, James B. Vredenburg, Lyman A. Walton and Joseph A. Duffy, and each of them, their agents, servants and attorneys, may be perpetually enjoined from acting as officers or directors of the Suburban Construction Company in any matter relating to the rights, interests or contracts of your orators with said Suburban Construction Company, or from interfering, disposing of or encumbering, moving out of the State, or otherwise disposing of the property of the Suburban Construction Company, or its books and papers, or from making any contract, agreement or settlement relating to the construction or operation of the lines of railroad of the Suburban Railroad Company or of the lines leased from the receiver of the Northern Pacific Railroad Company by said Suburban Railroad Company, and that said Suburban Construction Company, its officers, agents, directors, servants and attorneys, may be directed to immediately transfer and deliver to your orators such bonds and beneficial certificates as shall from time to time be due to your orators under and by virtue of said contract of November 28, 1896, and that your orators may have such other and further relief in the premises as to your honors shall seem meet."

A preliminary injunction was granted. Two reasons are urged by appellants why the injunction should be dissolved:

1. It is contended that the true scope and purpose of the bill is to enforce a specific performance of the contract of November 28, 1896; that this contract is lacking in mutuality of possible enforcement; that it is such a contract as must come within the rule that courts will not specifically enforce railroad building contracts, and contracts for personal services; and that the prayer for injunction, being but ancillary to the main relief sought, can not avail, if the bill fails in its main purpose.

2. That the injunction was improvidently issued, because without notice to defendants and without sufficient showing in avoidance of notice.

If the contract in question could not be specifically enforced as against the complainants, it should not be so enforced against the defendants.

This doctrine of mutuality seems to be well settled. In *Peto v. Brighton, etc., Ry. Co.*, 1 Hemming & Miller, 468, the vice-chancellor says: "This case turns upon the question how far this court can interfere where a contract provides that the plaintiffs, in consideration of certain shares and other advantages, which the company engaged to give them, were to complete the construction of some ten or eleven miles of railway. * * * Now, on this the difficulty at once arises, that if I restrain the transfer of these shares, I can only do so on an undertaking, on the part of the plaintiffs, that they will perform their part of the agreement; a submission to do so is a necessary ingredient in the bill, and it is essential that that offer should be one over which this court should have complete control. * * * If these gentlemen, being under an undertaking, express or implied, to perform this agreement, should fail in doing so, I could not place the parties in the position in which both sides intended that they should be, and I should be driven to leave the defendants, when they came here to complain of such failure, to their remedy at law. Seeing, therefore, that no arrangement could so deal with the case as to do

complete justice to both sides, I think the only proper course for this court to take, is to leave both parties to their remedies at law."

The same rule is declared in *Cooper v. Pena*, 21 California, 411:

"In respect to the remedy, therefore, there is no mutuality, and it is universally admitted that equity will not enforce a contract when the party asking its enforcement can not himself be compelled to perform it." And in *Tyson v. Watts*, 1 Maryland Ch., Sec. 13:

"And in addition to the elements of fairness, justice and certainty, the agreement must be mutual before the power of the court to order its specific performance can be successfully invoked." And in *Duvall v. Myers*, 2 Maryland Ch., Sec. 401:

"As I understand the decision, the right to a specific execution of a contract so far as the question of mutuality is concerned, depends upon whether the agreement itself is obligatory upon both parties, so that upon the application of either against the other, the court would coerce a specific performance." And in *Waterman on Spec. Perf.*, Sec. 196:

"It is immaterial what constitutes the want of mutuality, whether resulting from personal incapacity, from the nature of the contract, or from any other cause. Whenever the absence of the essential element is ascertained to exist on the part of one of the contractors, and for that reason is incapable of being enforced against him, he will be equally incapable of enforcing the contract against the other party." And in *Fry on Spec. Perf.*, Secs. 440-441:

"A contract to be specifically enforced by the court must be mutual—that is to say, such that it might, at the time it was entered into, have been enforced by either of the parties against the other, * * * where the plaintiffs had agreed to perform certain services in making a railway, which were of such a confidential nature that the court could not have enforced them if the defendants had sued the plaintiffs; and the defendants were to pay money, and do nothing else, the court refused specific performance,

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on the ground, among others, of want of mutuality." And in *Lancaster v. Roberts*, 144 Ill. 223, quoting Fry on Specific Performance, as above:

We come then to the question: Could this contract be specifically enforced as against appellees?

The contract is, in effect, an agreement upon the part of appellees to construct and equip a railroad, and to operate the railroad for a period of two years. The performance by appellees is but partly executed.* Courts will not undertake to enforce specific performance of contracts, extending over considerable time and including a series of acts essential to a complete performance. Among such contracts, non-enforceable specifically, railroad building contracts seem to be included. In *The South Wales Ry. Co. v. Wythes*, 1 Kay & Johnson, 186, the vice-chancellor says:

"In the cases referred to, from that of *Flint v. Brandon* to *Stover v. The Great Western Ry. Co.*, which was decided not in any way in opposition to the rule, but in perfect accordance with it, the court has held that contracts for building, and contracts for executing works generally, are matters which, in the first place, the court can not easily superintend. * * *

In *Stover v. The Great Western Ry. Co.*, the court anxiously guarded itself, by pointing out the special circumstances of that particular case. * * * But this court could hardly bring a suit of this description to a termination; the motions would have to be incessant for committal, or otherwise, for non-performance of the different orders with regard to the making of a particular bridge, cutting or other work."

In *Ross v. The Union Pacific Ry. Co.*, a case in many respects similar to the one under consideration, reported in *Woolworth*, p. 30, Justice Miller says:

"The plaintiffs have done work and furnished material to the value of \$40,000 or \$50,000. They have made extensive arrangements for procuring the necessary capital, and for the purchase of the iron, and are fully ready and able to prosecute the work diligently and successfully. But the

defendant has notified them that their contract is forfeited, and the work covered by it he has employed other parties to perform. To secure its bonds, which are to be delivered to the new contractors, etc., the defendant has made mortgages on the road. The bonds have not been issued yet. The bill therefore prays for an injunction to prevent their issue, and on final hearing, that the defendant may be decreed specifically to perform its covenants in said contract.

If, for the purpose of compelling the parties to perform specifically their contract, the court, on the case made by its bill, ought to entertain it, it should grant the injunction. * * *

On the other hand, if on the hearing, specific performance will not be decreed, there is no ground for the injunction, which is sought only for the purpose of making the final decree effective. * * *

It is the settled doctrine of this court that such a contract will not be specifically enforced, unless the remedy is mutual; that is to say, that the covenant of the plaintiff to be performed on his part, and that of the defendant on his part, must both be of such a character that, if either of them shall be delinquent, the court can give relief by compelling its performance specifically by him. (Citing 2 Story Eq. Jr., Sec. 711, 723, 790; *Catheart v. Robinson*, 5 Peters, 264.) I proceed, then, to inquire whether this contract is of such a character that, if the plaintiffs were in default, it could be specifically enforced as against them by a decree of this court.

No case is reported, I believe—at least none has been produced on the hearing—in which the court has undertaken to compel a party to build a railroad.” And after a careful analysis of cases cited as apparently holding contra, the court concludes: “I am inclined to concur fully with Judge Story, that, in cases of contract to build a house or a bridge, ‘or, I will venture to add, a railroad,’ a specific performance would not now be decreed.”

“It seems, therefore, that in granting this injunction, which would require that this railroad should be built, equipped and delivered by one party, and payments made by the other, under the control and compulsion of the court,

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I should be going far beyond any adjudged case, or any principle established by any adjudged case."

Nor will courts attempt to do that which is beyond their power to accomplish, viz., to enforce specific performance of contracts requiring personal service. *Kennicott v. Leavitt*, 37 Ill. App. 437, and cases therein cited.

Counsel for appellees urge that as this contract is largely executed, the rule, which has been so generally applied to contracts, mainly executory, may not here apply.

But the reason of the rule, viz., the difficulty of enforcing and supervising a continuous course of action, involving the rendering of some considerable personal service, still obtains. No matter how much has been done, the vital question remains, what is yet to be done? Here is still a portion of the road to be constructed, and the entire road to be operated. How can a court enforce and superintend this service? And, if not, then, mutuality of enforcement being wanting, it should not enforce the payment in part for such service.

A case wherein the services of the contractor had been partially rendered and the contract partly executed, is found in *Fallon v. Railroad Co.*, 1 Dillon, 121.

While there is some conflict of decisions, the decided weight of authority seems to be to the effect, that, where the object of a bill in equity is to enforce specific performance of a contract and that object can not be attained, the writ of injunction, ancillary thereto, falls with the bill. That is, the court will not say, "We are unable to decree a specific performance of the contract, but we will restrain from actions which are inconsistent with the contract."

In *Allen v. Burke*, 2 Maryland Ch., Sec. 537, the chancellor says:

"The object of the bill is to enforce the specific performance of the agreement therein referred to, and for an injunction in the meantime to restrain the defendant from taking and conveying away," etc., etc., * * * "and it seems to me quite clear that if upon the plaintiff's case, as exposed by his bill, he is not entitled to a specific execution

of the agreement set up by him, he can not be entitled to the injunction, which is only ancillary to the principal object of the suit."

Counsel for appellees contend that there is a decided conflict of authorities upon these questions, viz., the doctrine of mutuality and non-enforcement of contracts of this sort, and the necessity of the failure of the relief by way of injunction upon the failure to attain a specific performance. And in support of their contention cite *Lumley v. Wagner*, 1 DeG., M. & G. 616, the leading case from which all authority seems to have been drawn for decisions contrary to the established rule. Upon careful analysis, however, a reason may be found why the court might in that case refuse to enforce a specific performance, and yet grant the writ of injunction prayed in the same bill. The defendant, a singer, had agreed to sing at plaintiff's theatre, and not to sing at any other, and the court enjoined her from performing at a rival establishment, though it was clear that the court could not compel her to sing for the plaintiff. But there were two important elements distinguishing it from the other authorities, viz., a covenant not to sing elsewhere, disregarded and broken, and in addition to the wrong done to plaintiff by breach of the engagement with him, a new and affirmative wrong threatened by aiding a competing rival. Hence the decision in this case may properly be regarded as resting upon other grounds and in no way conflicting with the authorities heretofore cited.

The case of *Singer Co. v. Union Co.*, 1 Holmes, 257, rests upon the authority of *Lumley v. Wagner*, but without the same distinguishing features, and is a case clearly in conflict with the majority of English and American decisions. The court says in that case:

"The relief asked is specific performance and injunction. It is argued with great ability by the defendants, that the complainant is not entitled to specific performance, and that, therefore, it can not have an injunction which is merely auxiliary. Granting the premises, I am not prepared to concede the conclusion. If the court can not order a contract

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for the making of button-hole machines to be specifically performed by reason of the impossibility of supervising the details of such a business, it does not follow that the bill may not be retained as an injunction bill. It was formerly thought that an injunction would not be granted to restrain the breach of any contract, unless the contract was of such a character that the court could fully enforce the performance of it on both sides. * * * Upon this ground there were many decisions refusing to interfere with contracts for personal service, however flagrant might be the breach of them. (Citing *Kemble v. Kean*, 6 Sim. 333; *Kimberly v. Jennings*, Id. 340; *Baldwin v. Society*, etc., 9 Sim. 393.) * * * "But all these cases were overruled, by one of the ablest chancellors who has adorned the woolsack, in *Lumley v. Wagner*."

That this case is clearly in support of appellee's contention, and quite irreconcilable with the authorities above cited, is beyond dispute. It can only be said of it that it stands against the decided weight of authority, and hardly supported by the reason of *Lumley v. Wagner*, from which it draws its authority. The Supreme Court of this State, while not passing upon the precise questions here involved, has yet indicated that it does not follow the reasoning of *Singer Co. v. Union Co.* In *Chi. Mun. Gas Light Co. v. Town of Lake*, 130 Ill. 60, the court say:

"The bill of complaint in this case, though not strictly a bill for the specific performance of a contract, is, in substance, a bill of that kind. In *Pomeroy's Eq. Jr.*, Sec. 1341, it is said: An injunction restraining the breach of a contract is a negative specific performance of that contract. The jurisdiction of equity to grant such injunction is substantially coincident with its jurisdiction to compel a specific performance."

Counsel also cite a number of decisions of the Supreme Court of the United States as sustaining their contention.

Upon examination it will be found that no one of them is in conflict with the rule.

In *U. P. R. Co. v. C., R. I. & P. R. Co.*, 163 U. S. 564, the

court say in effect that the facts take it without the rule, thus: "But it is objected that equity will not decree specific performance of a contract requiring continuous acts, involving skill, judgment and technical knowledge, nor enforce agreements to arbitrate, and that this case occupies that attitude. We do not think so. The decree is complete in itself, is self-operating and self-executing," etc.

In *Joy v. St. Louis*, 138 U. S. 1, the use of the tracks of one railroad by another railroad company was involved, and the court say: "It is urged that the court will be called upon to determine from time to time what are reasonable regulations to be made by the Wabash company for the running of trains upon its tracks by the Colorado company. But this is no more than a court of equity is called upon to do whenever it takes charge of the running of a railroad by means of a receiver. Irrespectively of this, the decree is complete in itself, and disposes of the controversy, etc. * * * Considerations of the interests of the public are held to be controlling upon a court of equity when a public means of transportation, such as a railroad, comes into the possession and under the dominion of the court."

In *Franklin Tel. Co. v. Harrison*, 145 U. S. 459, the contract was for use by the complainant of certain telegraph wires. The case turned upon questions of right to terminate and hardship upon the parties in event of enforcement. The questions herein considered were not passed upon or discussed.

In *Denver & R. G. Ry. Co. v. Alling*, 99 U. S. 463, there were involved construction of certain acts granting railroads right of way through public lands of the United States. And the court only undertakes to supervise the operation of the railroad to the extent of defining their respective rights under such grants.

In *Memphis & L. R. R. Co. v. Southern Ex. Co.*, 117 U. S. 1, the questions involved were the relative rights of railroad and express companies, and the interest of the general public therein. In no event could the decision of the court there be construed as sustaining counsel's contention.

The case of *W. U. Tel. Co. v. U. P. Ry. Co.*, 3d Fed. Rep. 428, also cited, presents peculiar facts, as shown by the opinion of the court. "If the contract were set aside it would, I think, leave the parties joint owners of the property, and a case for equity jurisdiction, in the adjustment and settlement of their respective interests would be presented."

So far as the decision announces, the doctrine that the court may negatively enforce specific performance by injunction, where it might not enforce such performance affirmatively, it rests solely upon the citation of *Pomeroy on Spec. Perf.*, Secs. 24, 25, 310, 311 and 312. By examination of these sections we see that the author does not extend the doctrine announced beyond the cases applied to actors and singers, based upon *Lumley v. Wagner*, and the enforcement of covenants *not* to do specific acts. And as to the latter, qualifies thus (Sec. 25): "But the court will not interfere to restrain the breach of such a stipulation when it is merely ancillary to a more general contract, which can not be specifically enforced in its entirety." And in Sec. 312: "Finally, contracts which by their terms stipulate for a succession of acts, whose performance can not become consummated by one transaction, but will be continuous, and require protracted supervision and direction, with the exercise of special knowledge, skill or judgment in such oversight, such as agreements to repair or to build, to construct works, to build or carry on railways, mines, quarries and other analogous undertakings, are not, as a general rule, specifically enforced."

The American courts seem to have been loth to follow the doctrine of *Lumley v. Wagner*, and certainly have not generally extended that doctrine beyond the reasoning of that case and the class to which it belongs.

We think it safe to conclude that no case can be found (certainly none has been cited to us, and we are unable to find any), in which it is held that a building contract providing for the construction and operation as well, of a railroad, can be specifically enforced, either as against the contractors to build and operate, or as against those with

whom they contract, and who are obligated to pay therefor, whether in money or in stock and bonds.

The remaining contention of appellants is that the writ should not have been issued without notice.

This court has repeatedly held that to avoid the necessity of notice under the statute, the complainant must show such facts by sworn statement, either in the bill or by affidavit accompanying the bill, as will lead the court to the conclusion that the rights of complainants will be unduly prejudiced if notice be given before the writ issues. *Becker v. Deffenbaugh*, 66 Ill. App. 504, and cases therein cited.

No such showing is here made. The affidavit refers to the statements of the bill. They are as follows:

"That complainants fear that unless restrained immediately and without notice said parties and pretended directors and officers of the Suburban Construction Company and said Suburban Railroad Company will enter into *some* contract, or make *some* fraudulent settlements whereby the interests of complainants and the Suburban Construction Company and the Suburban Railroad Company and the value of the bonds of the Suburban Railroad Company, and the beneficial certificates of Shope, trustee, will be greatly diminished and injured, and your orators will be unduly prejudiced, and that if a notice of the application for a temporary injunction herein were given to them, that they would take such action before the said motion could be heard, thereby inflicting irreparable injury to your orators, and involving your orators and their property and contract rights in litigation, and thereby preventing the completion of the lines of said railroad on or before the first day of July, 1897, as required to be done under the ordinances of said town of Cicero."

What specific act is it that the defendants, or any of them, threaten to do, or, are likely to do, whereby complainant's rights could be prejudiced? The statements of acts threatened, or likely to be done, are too vague and indefinite to warrant the court in concluding that there was any danger that any specific thing would occur, prejudicial to

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complainants, if the issuing of the writ were delayed for notice.

But the appeal is effectually disposed of by the decision reached upon the point first considered. Because the bill is in spirit and substance a bill for the specific performance of a portion of a railroad building contract, and for the rendering of personal services in the operating of a railroad, in considerable part unexecuted, and hence not a contract enforceable in equity, and because the injunction is but ancillary to such specific performance, the order is reversed and the cause remanded, with direction to the Circuit Court to dissolve the injunction.

C. C. Gibson, Use, etc., v. J. W. Ackermann and Mrs. J. W. Ackermann.

70	399
80	183
70	399
97	569

1. **REPEALS—By Implication—The Rule as to, Stated.**—Repeals by implication are not favored, and in order to work a repeal, a new law, if it contains no express words repealing the old law, must be repugnant to it, and the repugnancy must be clear. The new law must fully embrace the whole subject of the old law, and as a general rule such parts of the old law as may be incorporated into the new law consistently therewith must be considered in force.

2. **CERTIORARI—Sec. 75 to 80 of the Act of 1872 in Regard to Justices and Constables Not Repealed.**—The act of 1895, in regard to justices and constables, does not repeal sections 75 to 80 of the act of 1872 on the same subject, and the statutory right of appeal by certiorari still exists as it did prior to July 1, 1895.

3. **SAME—Facts to Be Shown by Petition.**—A petition for a writ of certiorari, showing in detail that the petitioner was not negligent, that the judgment is unjust and that it was not in his power to appeal in the ordinary way, sets up all the essential facts.

Petition for Certiorari.—Appeal from the Circuit Court of Cook County; the Hon. EDMUND W. BURKE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 15, 1897.

CHARLES PICKLER, attorney for appellants.

Where a later act covers the whole subject-matter of an earlier act, does not purport to amend it, but plainly shows

that it was intended as a substitute for the earlier, it will operate as a repeal of the earlier act; it is the only law upon that subject, although it contains no repealing clause. When a statute is revised, or one act formed from another, some parts of the former being omitted, the parts omitted are not to be revived by construction. The legislature is presumed to have had the former statutes before it and to have been acquainted with judicial construction. The provisions of the earlier law not contained in the later will be presumed to have been intentionally omitted. And the rule is the same, although the omission is caused by accident—it belongs to the legislature to supply it. *Culver v. Bank*, 64 Ill. 528; *Andrews v. People*, 75 Ill. 605; *Devine v. Cook County*, 84 Ill. 590; *Eaton v. Graham*, 11 Ill. 622; *Ill. & Mich. Canal v. Chicago*, 14 Ill. 334; *Hunt. v. Chicago & D. R. R. Co.*, 20 Ill. App. 282; *Steele v. Lineberger*, 72 Pa. 241; *In re Wheelock* (Sup. Ct.), 3 N. Y. Supp. 890; *In re Alexander* (Sup. Ct.), 3 N. Y. Supp. 892; *Combined S. & P. Co. v. Flournoy* (Va. 1892), 14 S. E. Rep. 976; *Buck v. Spofford*, 31 Me. 36.

The petition is insufficient because the act of 1872 requires that the petition shall set forth, (1) that the judgment was not the result of negligence in the party praying the writ, and that the party was diligent in defending; (2) that the judgment is unjust and erroneous; (3) that it was not in the power of the party to take the appeal in the ordinary way; and these three facts must be shown by the petition, not merely alleged as conclusions of law. *First N. Bank v. Beresford*, 78 Ill. 391.

The party desiring to appeal from the justice must use more than ordinary diligence, and no presumptions are indulged in favor of the writ. *Cushman v. Rice*, 1 Scam. 565; *White v. Frye*, 2 Gil. 65; *Lord v. Burke*, 4 Gil. 463; *Town of Waverly v. Kemper*, 88 Ill. 580.

The petition should be taken most strongly against petitioner. *O'Hara v. O'Brien*, 4 Brad. 156.

CONSIDER H. WILLETT, attorney for appellees.

Repeals by implication are not favored in law. *People v. Barr*, 44 Ill. 198.

“When the latter enactment is worded in affirmative terms only, without any negative, expressed or implied, it does not repeal the earlier law.” 23 Am. & Eng. Ency., 483.

Where the whole purview of the two statutes is different, and there is no essential repugnancy between them, they will stand together in the absence of a repealing clause, even though they refer to the same object. *In re Gannett*, 11 Utah, 289; *Mills v. State*, 23 Tex. 295.

Without repealing words in a new statute which relates to several remedies contained in the old statute, which new statute covers several remedies, but omits one or more, as certiorari, such omitted remedy exists after the passage of the new statute without repealing words precisely as it stood in the old statute.

In the absence of any repealing clause, it is necessary to the implication of a repeal that the object of the statutes, as well as the subject, be the same. If they are not, both statutes will stand, although they refer to the same subject. 23 Am. & Eng. Ency., 482.

In *People v. McAllister*, 37 Pac. Rep. (Utah), on page 580, it is said: “Both statutes must be construed together and be given effect, if possible, for a repeal by implication is not favored in law. Even where some of the provisions of a former statute are inconsistent with or repugnant to a later one, the repeal by implication will operate only to the extent of such inconsistency or repugnancy. When, as in the case at bar, there is a difference in the purview of two statutes, though relating to the same subject, the former is not repealed by the latter, in the absence of a repealing clause; and the legislature, when enacting the latter law, is presumed to have knowledge of all former laws relating to the same subject. The doctrine of repeal by implication proceeds on the ground that it was the intention of the legislature, and such intention must be manifest before the repeal can become effectual.” *People v. McAllister*, 37 Pac. Rep. 580;

Suth. St. Const., Secs. 138, 160; U. S. v. Clafin, 97 U. S. 546.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellant, for the use of Pickler, obtained judgment in trover by default before a justice of the peace for the alleged value of a certain trunk and contents, for which he had brought suit in replevin against appellees, the officer having failed to find the property.

The judgment was rendered August 5, 1895, but appellees had no knowledge of that fact until long after the time for appeal had elapsed, and as soon as they learned of the judgment, filed their petition for certiorari in the Circuit Court.

The trial court overruled a motion to quash the writ of certiorari for insufficiency of the petition, and upon a trial, a jury being waived, found for appellees and rendered judgment in their favor for costs.

Two contentions are made on this appeal, viz.:

1st. That the Circuit Court had no power to grant an appeal by certiorari, since the act of July 1, 1895, with reference to justices and constables.

2d. That the petition for certiorari is insufficient.

Chap. 59, Secs. 72 to 77, inclusive, Rev. Stat. 1845, under title of justices and constables, gave to the Circuit Courts of this State the power to grant writs of certiorari to remove causes from justices of the peace; prescribed the practice in the Circuit Court in such cases, what the petition should set forth, and provided that such proceedings should be had thereon as in cases of appeals.

These provisions were substantially re-enacted by Secs. 75 to 80, inclusive, of the act of July 1, 1872, entitled "an act to provide for the election and qualification of justices of the peace and constables, and to provide for the jurisdiction and practice of justices of the peace in civil cases, and fix the duties of constables and to repeal certain acts therein named." Thus the law remained until the act of July 1, 1895, was enacted. It will be seen from an exam-

ination of these sections, that they relate solely to the proceedings to be taken in the Circuit Court, and the effect of such proceedings upon the parties concerned, justices of the peace and constables.

The act of July 1, 1895, is entitled "an act to revise the law in relation to justices of the peace and constables," but does not contain either of said Secs. 75 to 80, inclusive, or anything relating to the proceedings in the Circuit Court, nor as to the method of appeal by certiorari, except that Art. 10, Sec. 116, provides that "one or more of several plaintiffs or defendants may appeal or sue out a certiorari without the consent of the others, and all further proceedings shall thereupon be stayed, the same as if all had united in such appeal or certiorari;" Sec. 117 provides for a stay of proceedings by the justice and constable "as soon as the writ of certiorari shall be served on such officer," until the further order of the court; and Sec. 118 provides for the issuance of execution on "judgments rendered in cases of appeal and certiorari."

The new act contains no repealing clause of the act of 1872, or any part of it, but it is contended that the whole of the old act is repealed, because the act of 1895 is a complete revision of the whole law as to justices of the peace and constables as it existed prior to July 1, 1895.

There being no express repeal of the old act, if it is repealed, it must be by implication, based on the claim that the new act is a complete revision of the whole subject-matter of the old act.

Appellant relies on, among other cases, *Culver v. Bank*, 64 Ill. 528, and *Devine v. Cook County*, 84 Ill. 590, and they support the general proposition contended for, but an examination of these cases shows that the later laws covered the whole subject-matter of the old laws—in the *Devine* case much more—and in each case the later laws were repugnant to the old laws.

In the case at bar the new act does not purport to revise the old law, in so far as it contained provisions regarding the proceedings in the Circuit Court, and therefore can not

be said to be a complete revision of the whole subject-matter of the old act.

There is also another principle in the construction of statutes applicable to this case, which is that repeals by implication are not favored. *Town of Ottawa v. County of LaSalle*, 12 Ill. 339; *People v. Barr*, 44 Ill. 198; *People v. McAllister*, 37 Pac. Rep. 580.

In order to work a repeal, the new law, if it contains no express words repealing the old, must be repugnant to the old, and the repugnancy must be clear. The new law must fully embrace the whole subject of the old law. *Potter's Dwarris on Stat.* 154 ns. 4 and 5, and cases cited; *Sutherland on Stat. Const.*, Secs. 158 and 160, and cases cited; *Dugan v. Gittings*, 3 Gill. Md. 140-54, and cases cited; 23 Am. and Eng. Ency. of Law, 482.

As a general rule, such parts of the old law as may be incorporated into the new law consistently therewith must be considered in force. *Bruce v. Schnyder*, 4 Gilm. 221-71; *Town of Ottawa v. County of LaSalle*, 12 Ill. 339; 23 Am. and Eng. Ency. of Law, 482.

As has been noted, Secs. 116, 117, and 118 of the new law all recognize a mode of appeal by certiorari, and evidently contemplate the statutory writ of certiorari as it had existed in this State for over fifty years. Certainly the legislature has expressed no intention to repeal the provisions of the old law as to appeal by certiorari.

These sections are in no way repugnant to, nor inconsistent with, the provisions of the new act. The new act does not cover the whole subject of the old. These sections regarding certiorari may be held to be in force without in any way conflicting with any express or implied intent of the legislature. We therefore conclude that the statutory right of appeal by certiorari still exists as it did prior to July 1, 1895.

It has seemed to the court unnecessary to consider the question raised on oral argument, as to the history of the new act.

The motion of appellant in the trial court to quash the

Dickinson v. Citizens Nat. Bank of Franklin.

writ of certiorari admitted the truth of all the allegations of fact in the petition. The petition shows all the essential facts in detail necessary to entitle appellees to the writ of certiorari, to wit, that appellees were not negligent; that the judgment was unjust, and that it was not in their power to appeal in the ordinary way.

This case is clearly analogous to Kern v. Davis, 7 Ill. App. 407.

The judgment of the Circuit Court is affirmed.

**W. P. Dickinson v. Citizens National Bank of Franklin,
Indiana.**

1. PLEADING—*Failure of Consideration*.—A failure or partial failure of consideration of a note sued on must be specially pleaded to enable a party to make that defense. Evidence of it is not admissible under the general issue.

Assumpsit, on two promissory notes. Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 15, 1897.

JAMES L. CLARK, attorney for appellant, contended that recoupment may be shown under a plea of the general issue, citing Higgins v. Lee, 16 Ill. 495; Cooke v. Preble, 80 Ill. 381; Babcock v. Trice, 18 Ill. 420; Crabtree v. Kile, 21 Ill. 180; Mears v. Nichols, 41 Ill. 207.

PARKER & PAIN, attorneys for appellee.

It has been repeatedly held that want or failure of consideration as a defense to promissory notes, must be specially pleaded to be available. Rose v. Mortimer, 17 Ill. 475; Keith v. Mafit, 38 Ill. 303; Teuber v. Schumacher, 44 Ill. App. 577; Mann v. Smyser, 76 Ill. 365; Welch v. Hoyt, 24 Ill. 117; Wilson v. King, 83 Ill. 232.

It has been held in many cases that the defense of breach

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of warranty of chattels for which a promissory note has been given is clearly in the nature of want or failure of consideration, and such defense must be pleaded or notice of it given under the statute. *Beers v. Williams*, 16 Ill. 69; *Owens v. Sturges*, 67 Ill. 366; *Crabtree v. Kyle*, 21 Ill. 180; *Waterman v. Clark*, 76 Ill. 428; *Leggat v. Sands*, 60 Ill. 158.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant on two promissory notes. The declaration contains special counts on the notes and the common counts.

The appellant pleaded the general issue only. Appellee on the trial introduced in evidence the notes sued on, and proved the amount of interest due, and rested.

"It was admitted that the notes in question were not the property of the plaintiff, but were the property of one John R. Brickett, and the plaintiff was only interested as an agent for their collection."

Appellee was the legal holder of the notes, they having been indorsed to it by John R. Brickett, the payee.

The foregoing admission having been made, the appellee called as a witness, W. P. Dickinson, the appellant, who testified as follows:

"Q. What transaction did the notes, offered in evidence in this case, grow out of?

A. Out of the sale of certain horses to me by John R. Brickett.

Q. State what the transaction was and the terms and conditions of the sale?"

To which last question appellee's counsel objected on the ground that the evidence was inadmissible under the general issue, which objection the court sustained. Appellant's counsel then stated that he sought to recoup against the plaintiff's claim for damages resulting from a breach of warranty as to the soundness and breeding of the horses; that they were purchased under a warranty that they were sound and standard bred, and subject to be registered as

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such; that Brickett had agreed to give appellant a pedigree showing their breeding and entitling them to be registered, when, in fact, they were unsound and not standard bred, and that Brickett had wholly failed, etc.

The court, on appellee's objection, excluded the evidence, and the defendant offering no further evidence, instructed the jury to find for the appellee. The appellant assigns this ruling of the court as error, and relies solely on this assignment for a reversal of the judgment.

Appellant's offer was to prove a partial failure of consideration, and the only question is whether such proof was admissible under a plea of the general issue.

The law is well settled by numerous adjudications, that proof of failure or want of consideration can not be made under the general issue pleaded to a declaration containing a special count on a promissory note. *Rose v. Mortimer*, 17 Ill. 475; *Keith v. Maft*, 38 Ill. 303; *Leggat et al. v. Sands Brewing Co.*, 60 Ill. 158; *Waterman v. Clark et al.*, 76 Ill. 428; *Wilson et al. v. King*, 83 Ill. 232; *Schroer et al. v. Wessell*, 89 Ill. 113; *Sheldon v. Lewis*, 97 Ill. 640.

The decisions cited are strictly in accordance with section 9 of the statute entitled "Negotiable Instruments," which provides that when an action is brought on a note, failure of consideration, total or partial, may be pleaded.

To permit proof of such failure under the general issue to a declaration containing a special count on the note, would, as the court has well said in *Leggat et al. v. Sands Brewing Co.*, *supra*, be virtually to repeal the statute which permits the filing of pleas of failure and partial failure of consideration.

The judgment is affirmed.

Henry Greenebaum v. The American Trust and Savings Bank, Assignee.

70	407
76	365
70	407
199	468

1. BANKS AND BANKING—*Checks Presented After Insolvency of Bank, as a Set-off Against Debt to Bank.*—A debtor of an insolvent bank, which has made an assignment for the benefit of creditors, can not set-off

against his debt to the bank, a check drawn in his favor by a depositor of the bank, and not presented for payment until after the assignment.

Assumpsit, on a promissory note. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 15, 1897.

WALKER, JUDD & HAWLEY, attorneys for appellant.

MORAN, KRAUS & MAYER, attorneys for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This was an action in assumpsit commenced in the Superior Court of Cook County, by appellee, as assignee of Herman Shaffner & Company against appellant upon a promissory note for the sum of \$750, executed and delivered by appellant to Herman Shaffner & Company.

The evidence showed the making of the note in question and the amount due thereon, amounting to \$929.50. That on June 3, 1893, Abraham G. Becker, the sole surviving partner of Herman Shaffner & Company, executed and delivered upon behalf of Herman Shaffner & Company a deed of assignment for the benefit of creditors, to appellee, as assignee; that among other assets of said Herman Shaffner & Company was the note in question; that appellee at the time of trial was, and continuously from June 3, 1893, had been, in the discharge of such duties as such assignee.

It being stipulated that all defenses might be introduced under the general issue in manner and form as though specially pleaded, the defendant proved that the firm of H. & D. S. Greenebaum, for a long time prior to the assignment of Herman Shaffner & Company had a general deposit account with the said Herman Shaffner & Company as bankers, upon which checks were drawn by said H. & D. S. Greenebaum and paid by said Herman Shaffner & Company in the course of its general banking business; that at the date of said assignment said Herman Shaffner & Company held as a deposit to the credit of H. & D. S. Greenebaum the sum of \$658.62; that thereafter at the time of the maturity of the note sued on said H. & D. S. Greenebaum drew

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its check for the amount of \$658.62 against said deposit on said Herman Shaffner & Company to the order of appellant; that appellant then presented said check to appellee and to said Abraham G. Becker, and demanded payment thereof, and in default thereof tendered said check, together with the difference between the amount thereof and the amount due on said note, to appellee and Abraham G. Becker in payment of said note; that said tender was refused.

Appellant claimed the right to set off the amount due under said check against the amount due upon said note.

Upon the conclusion of all the testimony the court excluded this evidence, which was all of the evidence of the defendant, and instructed the jury to find a verdict for the plaintiff for \$929.50.

Appellant contends that the set-off should have been allowed, and that the check offered in evidence thereof was improperly excluded. No other error is suggested.

Although counsel for appellant do not so present their contention, yet is it true that their contention could only be maintained upon one of two theories, viz., either that a partnership credit may be set off as against the debt of an individual partner, or, that the debtor of an insolvent estate may purchase claims of third parties against such estate, after assignment by the insolvent, and set off such purchased claims against his individual debt due to the assignee.

The fallacy of the first, as a proposition of law, is obvious, and is conceded by appellant.

Nor is the second proposition maintainable. The doctrine is well settled that the debtor of an insolvent bank, which has made an assignment for the benefit of creditors, can not set off against his debt to the bank a check drawn in his favor by a depositor of the bank, and not presented for payment until after the assignment. *Smith v. Hill*, 8 Gray, 572; *Northern Trust Co. v. Rogers*, 60 Minn. 208.

Counsel for appellant insist that the rights of any subsequent transferee (appellant) of the depositor (H. & D. S. Greenebaum) became fixed at the time of the creation of the relation between depositor and banker, and hence, as such relation was established between H. & D. S. Greenebaum,

as depositor, and Herman Shaffner & Company, as bankers, long before the assignment, that this deposit claim, although transferred in fact after the assignment, was, in contemplation of law, transferred before the assignment. And in support thereof, cite *Munn v. Burch*, 25 Ill. 35. The misapplication by counsel of this authority results apparently from the confusion of the rights relatively between banker and depositor and between banker and transferee of depositor. As between banker and depositor, the rights do accrue as of the time of the deposit. As between banker and transferee of the deposit, however, neither *Munn v. Burch*, or any other authority cited, holds that any rights accrue until presentation of the check.

"And with the whole world he (the banker) agrees that whoever shall become the owner (holder?) of such check, shall, upon presentation, thereby become the owner and entitled to receive the amount, etc. * * * Surely every sound lawyer will at once perceive a privity of contract between the banker and the holder of the check, created by the implied promise held out to the world by the banker, on the one side, and the receiving of the check for value and presenting it, on the other." *Munn v. Burch*, *supra*.

"That the giving of the check works no instant assignment as to the bank; that, as to it, before demand for payment no assignment exists, no obligation has been created, no privity has grown up," etc. *Northern Trust Co. v. Rogers*, *supra*.

The theory sought to be drawn by counsel from the language of *Munn v. Burch* is not tenable, viz., that because the banker impliedly agrees at the time of the deposit "with the whole world" as possible future transferees, therefore contractual relations are thereby, at the time of the deposit, created with any such future transferee.

Such privity begins as to such transferee only upon presentation by him of the check.

The claim of set-off was not valid. There was no error in the action of the trial court in excluding the evidence proffered, and in directing a verdict.

The judgment is affirmed.

Gay Dorn v. Phillip Geuder et al.

70	411
171s	382

1. **DECREES—*Upon Conflicting Evidence.***—Whether the interest note due March 3, 1895, was extended to a time subsequent to the filing of the bill, being a question of fact concerning which the evidence was conflicting, the court declines to disturb the decree, based upon the master's finding that there was no valid extension of the time of payment.

2. **EQUITY PLEADING—*Statement of Default in Making Payments.***—An allegation in a bill to foreclose a mortgage, "that default has been made in the payment of the principal sum of said note, together with a large amount of interest thereon," is sustained by proof of default in the payment of interest, where there is a clause in the mortgage sought to be foreclosed, giving the mortgagee the right to declare the principal due upon a failure to make any interest payment, and an allegation of the specific default relied on is not necessary.

Mortgage Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 15, 1897.

CHARLES PICKLER, attorney for appellant.

LACKNER & BUTZ, attorneys for appellees.

MR. PRESIDING JUSTICE ADAMS DELIVERED THE OPINION OF THE COURT.

On March 3, 1890, the appellant executed and delivered a trust deed upon certain real estate, to secure his principal note for \$6,000, payable three years afterward, with interest, evidenced by interest notes payable half yearly, said \$6,000 being a part of the purchase price for said real estate. No question is made but that all of said interest notes were paid.

As to what occurred afterward, the master in chancery, to whom the cause was referred, found and reported as follows:

"That afterward, the time of payment of said principal note was extended from the date of its maturity, March 3, 1893, by agreement of parties, to March 3, 1894, and that on maturity of extended time, by agreement of parties, the principal sum was extended from 1894 to 1897, and six

interest notes were given to evidence the interest for the last extended period; of these notes, the one maturing September 3, 1894, was paid, canceled and surrendered, the coupon note of March 3, 1895, was not paid at maturity, nor was any attempt made to pay it until after the commencement of this suit.

The trust deed contained a provision that if default should be made in payment of the indebtedness or interest thereon, the whole of the principal and all interest should, at the option of the legal holder of the note, become immediately due and payable.

One of appellant's contentions is that the bill was filed prematurely, because of a claimed valid extension of the time of payment of the interest note, maturing March 3, 1895, to a date subsequent to the filing of the bill, but that being a question of fact concerning which the evidence was conflicting, we would not disturb the decree, based upon the master's finding that there was no valid extension of the time of payment, with which we fully agree.

The point is made by the appellant that the bill does not support the real case, as shown by the proofs, upon which the appellee is entitled to relief.

Appellant's contention is that the two extensions above mentioned and the specific default relied on, namely, the non-payment of the interest note which fell due March 3, 1895, should have been stated in the bill, and that this not having been done, there is a variance between the allegations and the proof. We can not concur in this view. The bill avers "that default has been made in the payment of the principal sum of said note, together with a large amount of interest thereon."

All the notes given on the last extension, including the note due March 3, 1895, were for interest on the principal sum evidenced by the note for \$6,000, of date March 3, 1890. Appellant in his answer says that "the interest notes executed March 3, 1885, were given to evidence the interest to accrue upon said principal note during the three years, March 3, 1894, to March 3, 1897."

The default alleged being the non-payment of interest due

Lake St. Elevated R. R. Co. v. Johnson.

on the principal sum, and the proof showing such non-payment, there is clearly no variance between the allegation and the proof.

This disposes of all the objections relied on by appellant in argument.

The decree is affirmed.

Lake Street Elevated R. R. Co. v. Mary Agnes Johnson.

1. **DAMAGES**—\$2,500 *Excessive Under the Circumstances of this Case.*—The evidence in this case fails to show any basis for the jury's assessment of damages except shock, a sprained wrist, black and blue discolorations on the left limb, back and sides, and pain resulting from these, and for such injuries \$2,500 is excessive compensation.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed July 15, 1897.

KNIGHT & BROWN, attorneys for appellant.

CASE & HOGAN, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant for injuries which she alleged she received by the sudden starting of a train of cars of appellant from which she was alighting, whereby she was thrown down. By answers to special questions submitted to the jury, the jury found that her version of what caused her fall is true, and we should be disposed to allow the verdict to stand but for the considerations hereinafter stated.

Counsel for appellant contend that the trial court erred in the giving of divers instructions for appellee, and also in refusing eight of appellant's instructions.

It would extend this opinion unduly to discuss the propriety of the court's action in the giving and refusing of these instructions, and we deem it sufficient to say that after a full consideration of all the instructions in the case in connection with the evidence, we are of opinion that there is no reversible error in the case in that regard.

The statement of counsel for appellee in his argument to the jury, that certain testimony given on behalf of appellant "is rotten perjury" was strong language, and the trial court would, no doubt, have reprimanded counsel had its attention been called to counsel's language by an objection. This was not done, so far as the abstract of record shows, counsel for appellant being content with a statement that he took "exception to that remark."

An examination of the evidence as to the injuries claimed to have been sustained by appellee and the cause or source of such injuries shows, by a clear preponderance, that the fractured *coccyx*, growth of tumor in *pelvis* and *goitre* complained of by appellee, could not, in all reasonable probability, have resulted from her fall when alighting from appellant's train. At least it is plain that there is not a preponderance of the evidence showing these ills of appellee arose or grew out of the injury alleged in her declaration.

The evidence fails to show any other basis for the jury's verdict of \$2,500 except shock, a sprained wrist, black and blue discolorations on the left limb, back and sides, and pain resulting from these. Appellee had a physician for two or three weeks, and her injuries were not considered serious by her physician. She was injured August 11, 1894, and to a physician who examined her two days later, he testifies, she made no complaint of any injuries, except to her wrist, left knee, and pain in left side and in the left side of her head, and also that she said she had no others.

There is no evidence that the shock to appellee was serious, and it is apparent that her injuries, aside from the *coccyx*, tumor and *goitre*, were not such as to justify a judgment for \$2,500.

The judgment is therefore reversed as being excessive, and the cause remanded for another trial, in which it may be made to appear with more certainty that the ills of appellee are the result of her fall, or that a more reasonable assessment of damages may be had for the injuries which may appear to have resulted from her fall. Reversed and remanded.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

70 415
174 398

FOURTH DISTRICT—FEBRUARY TERM, 1897.

Cleveland, C., C. & St. L. Ry. Co. v. Charles Jenkins.

1. CONSPIRACY—*As an Aggravation of Damages.*—Conspiracy may be averred and proved in aggravation of damages in an action on the case, but it is not a material averment except where the wrong complained of would not have been actionable without it.

2. CASE—*For Breach of a Duty Arising Under a Contract.*—When the relation of master and servant exists, and under the custom of the business it becomes the duty of the master, when the relation is severed, to give the servant a letter or "clearance card," the servant has the right to treat a breach of this duty as tortious and sue in case.

3. PRACTICE—*Motions in Arrest of Judgment.*—A party can not move in arrest of judgment in the trial court, after judgment of that court upon a demurrer presenting the same objections.

4. PLEADING—*Defects Cured after Verdict.*—A verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action. If the issue joined be such as necessarily required, on trial, proof of the facts so defectively stated or omitted and without which it is not to be presumed that the verdict would have been rendered, such defect, imperfection or omission is cured by verdict.

5. MASTER AND SERVANT—*Right of a Servant to Demand a Letter of Recommendation.*—A master is under no legal obligation to give a testimonial of character to his servant, in the absence of an agreement or well recognized usage, under which an implied agreement to do so arises. And such a custom or usage must be so well known and established that it becomes part of the contract by implication, without expression.

6. SAME—*Indictment Against Servant in Suit for Failure to Give Letter of Recommendation.*—In a suit by a servant against his master

for a failure to furnish a letter of recommendation, where there is nothing to show that the defendant had any ground to refuse such letter other than the return of an indictment against the servant, and where the evidence shows that the servant was acquitted and stood with a record of ten years of faithful service, if the other elements necessary to a recovery be present, the fact that such indictment was returned will not constitute a defense.

7. INSTRUCTIONS—*Error Without Injury not Ground for Reversal.*—Although an instruction may have contained an error, if it appears that the context and the facts of the case would correct the error and that the jury were not misled by it, it will not be ground for reversal.

Trespass on the Case, for a refusal by a master to give a letter of recommendation. Appeal from the Circuit County of Wabash County; the Hon. SILAS Z. LANDES, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

JOHN T. DYE and C. S. CONGER, attorneys for appellant.

MUNDY & ORGAN and CULLOP & KESSINGER, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee, a former conductor of a freight train on appellant's road, to recover damages on a declaration, in effect, charging that, although plaintiff had been a faithful employe of defendant for ten years, as a conductor, he was discharged without cause; that although by the regulations and customs of the defendant, a letter or clearance card was given to discharged employes, such as plaintiff, showing time of service, etc., in order that he might secure employment on other roads, and which was essential for that purpose, yet, though he often applied for such paper, in order that he might get employment on other roads, it was refused to him, whereby he failed to secure employment thereon; that defendant and other railroad companies had a rule or custom, which is charged to be a conspiracy, not to employ a discharged employe of another road without such letter or clearance card; that plaintiff,

after such discharge, and after failure on request to receive such card, applied to various railroad companies for employment, but was uniformly refused employment because he did not have such card; that he had been receiving eighty-five dollars per month from the defendant for his services, and that he was qualified and competent to earn the same wages on other roads, and would have done so had he received such card, as he was entitled to; that he had been engaged in such service for many years, and was at the time of his discharge fifty years of age, and by reason of such failure and refusal on the part of the defendant, he was unable to secure employment, and was compelled to quit such line of work, to his great loss and damage.

There are some other averments incidental to those mentioned, made, as understood, in the way of aggravation of damages, as that the defendant maliciously charged plaintiff with the crime of larceny, which was baseless, and caused to be circulated the report that he was discharged because of such crime, for the purpose of injuring him. It is also averred there was a rule of defendant that if a conductor was laid off for any cause, then, within five days, his case should be given full investigation and a decision reached and if he was exonerated then he should receive full pay for lost time. A conspiracy is averred on the part of defendant and other roads; but in civil actions this is not a material averment, except where the wrong complained of would not have been actionable without it. *Jenner et al. v. Carson*, 111 Ind. 522; 2 Chitty Pl., 498. In civil actions, except as above stated, conspiracy may be averred and proved merely in aggravation of damages. *Van Horn v. Van Horn*, 20 Atl. Rep. 485. The gravamen, however, of the charge is that he was discharged and refused a clearance card, to which he was entitled, without which he could not and failed to obtain employment on other roads, whereby he suffered damage, etc.

This declaration avers a cause of action in case, arising out of a contract. That is, it avers a contractual relation, out of which, as alleged, arose the duty, when such con-

tractual relation was severed, to give a letter or clearance card for the purpose stated. A breach of this duty the plaintiff had a right to treat as tortious in this form of action. *Conger v. C. & R. I. R. R. Co.*, 15 Ill. 366; *Nevin v. Pullman Palace Car Co.*, 106 Ill. 222.

The plaintiff recovered a verdict and judgment below and defendant presents this appeal, assigning various errors as to the admission of evidence, the giving and refusing instructions, in overruling the motion for a new trial, and the motion in arrest of judgment. The last motion was based on the ground the declaration was insufficient to support a judgment. The record shows a demurrer was filed to the declaration, raising the same question, which was overruled, and thereafter the general issue filed.

It was held in *Stearns v. Cope*, 109 Ill. 340, that if a declaration was fatally defective the defect may be availed of by a motion in arrest even after a demurrer thereto has been overruled, but this holding was overruled in the carefully considered case of *C. & E. I. R. R. Co. v. Hines*, 132 Ill. 161. It is there said: "A party can not move in arrest of judgment in the trial court after judgment of that court upon a demurrer presenting the same objection," citing cases. It is further said: "There is an expression in *Stearns v. Cope*, 109 Ill. 346, not in harmony with these cases, but * * * the expression was unnecessary and inadvertent."

In the *Hines* case, however, the court proceeds to consider the question raised as to the sufficiency of the declaration, and say: "The rule is that a verdict will aid a defective statement of title, but will never assist a statement of a defective title or cause of action. * * * However, if the issue joined be such as necessarily required, on trial, proof of the facts so defectively or imperfectly stated or omitted, and without which it is not to be presumed that either the judge would direct the jury to give, or the jury would have given the verdict, such defect, imperfection or omission is cured by verdict." This answers the objection also made of a variance between the proof and the allegations.

There was no error in overruling the motion in arrest.

The declaration, in our judgment, states a good cause of action, though it might have been presented in better form.

There is full proof by six railroad men, most of them of large experience, that railroad companies do require such clearance cards before they will employ men coming from other roads. Besides, various clearance cards from several different roads were introduced in evidence, as evidencing the fact. There was no substantial contradiction of this evidence, except by two witnesses, as to defendant's road, and it was shown on cross-examination of one or both of these witnesses that such cards had been given by this road. They denied, however, that it was a custom. The full proof of such general custom, in fact uniform custom of long standing, of other roads to require such cards, together with the proof as to the practice of defendant company, warranted the jury and court below in finding, as a matter of fact, that the usage or custom to issue, on discharge, and demand the presentation before employment, of such cards, was general as to all roads, including the defendant. It is inconceivable that the defendant would be so unjust to its men as not to join in a usage so uniform of other roads, and without which, as this proof shows, employment could not be obtained. This is said without reference now to the case of this plaintiff. The point is, was there such a usage?

We do not understand on what ground the court refused to admit rule eleven, agreed upon, as plaintiff offered to show, by the labor organizations of railroad men and the railroad companies, including this defendant, that an applicant who had been discharged from one railroad company should produce a clearance card when asking employment with another railroad company. We think it was competent even as rebuttal evidence to that of Mr. Sutton and Mr. Bayley.

There being such a custom, and the proof clearly showing that such cards were absolutely essential, was the duty laid upon defendant thereby violated in this case? The evidence shows that plaintiff had faithfully worked for defendant

for many years; that he had been in the railroad business for twenty-four years, and had arrived at about the age of fifty years. The stipulation in the record shows that he was indicted for larceny November 6, 1893; for embezzlement, November 16, 1893; for larceny as bailee, April 4, 1894, two of these, as understood, for the same offense. The other was for another offense. They were procured on the complaint, principally, of one Jones, who was under indictment for the same offense and was convicted. The plaintiff appeared against Jones as a witness. The plaintiff was tried on two of the indictments and found not guilty; on the last one, January 17, 1895, when the other indictment was *nolled*. There is no evidence in this record as to what proof was offered tending to show his guilt; so that we must assume, and do in fact assume, that the plaintiff was unjustly accused. There is nothing to show the company had any other ground of suspicion, other than the return of the indictments, so that, as to the company, we must assume the stain was removed by the acquittal, and that he stood with a good record of ten years faithful service in its employ. He often applied for his clearance card before he was acquitted, asking that the facts be stated, and also within a few days after he was acquitted, but it was always refused, but not on the ground that such cards or letters were not given, and after persistent effort to get employment of other roads, he failed because, as he states, and his evidence on this point is not contradicted, of not having such card. It is stated by appellant's counsel that a card stating the facts would not have enabled or assisted him to get employment. This position is a mere assumption, for after his acquittal he stood before the law relieved of the charge as entirely as if it had never been made and from the evidence of the State's attorney, who tried the case and appeared as a witness for the defendant below, it would appear there was no moral stain left. It is not believed, from what appears in this record, that a baseless charge of crime, as the acquittals show, would have been a bar to employment.

It is said, however, by appellant's counsel, that the railroad company had a right to discharge him. This right is not questioned by the declaration, though it is averred the charge which caused the discharge was false and malicious. It is also said, quoting from Parsons on Contracts, p. 528: "The master is under no legal obligation to give a testimonial of character to his servant." This is well-recognized law, in the absence of an agreement, or well-recognized usage, under which an implied agreement arises, to do so. It is true such custom or usage must be so well known and established that it becomes a part of the contract in law by implication, without expression. *Turner v. Dawson*, 50 Ill. 85; *Wilson v. Bauman*, 80 Ill. 493. The court so instructed the jury in clear and terse language, and yet the jury evidently found there was such custom, which finding was sustained by the court. A careful examination of the evidence and circumstances, in our judgment, warrants such finding.

In view of these facts, if the finding is otherwise correct, as we believe it is, it is clear the defendant violated its duty to plaintiff in failing and refusing to give such card.

The damages allowed were not excessive. He was allowed only the sum of \$875 for being unlawfully deprived of the right and opportunity to get work in that line for which he had, by many years of faithful service, prepared himself, and at which he had been earning the sum of \$85 per month. This is less than his earnings for a single year in his chosen and rightful line of work, of which he was, by the wrongful act of defendant, deprived, so far as appears, for his future life. It is not necessary to elaborate on the helplessness of a man at the age of fifty years, who had for twenty-four years continuously been in a certain line of work, requiring skill and experience, being deprived of the right and opportunity of following that calling. It is almost like depriving him of the right to earn a living by the pursuit of an honorable calling; a right inherent, of which he can not be deprived by any rule, regulation or practice of employers of men. In this connection, on the

question of damages, the matter alleged in aggravation need not be considered in order to justify the amount of damages allowed. Though the plaintiff was pursued vigorously on the charges made against him, yet, under the proof, it can not be said the defendant participated improperly or maliciously in the investigation or trials. The suspension, if for the length of time stated by plaintiff, for over a year, against his protest, was oppressive, as it kept him from engaging in other regular work, and it may be the jury took this fact into consideration. However that may be, the damages assessed, if the defendant was liable, are not excessive.

Various objections are made to the ruling of the court on the introduction of evidence, and to giving and refusing instructions. It is objected that the plaintiff was permitted to testify to the contents of a letter delivered to him by the messenger of the company discharging him from the service.

Q. Tell the jury if you have got that letter *now*. A. No, sir; I have not got it *now*.

Q. What were its contents?

It would appear that both counsel and court did not observe the word "now," and permitted the question to be answered. The answer related, however, to an admitted fact that he was discharged, and therefore the error was harmless.

It is also objected that the court permitted plaintiff and others to testify that officials of the roads to whom they applied for employment declared they must produce clearance cards. There was no error in this ruling; neither was there error in permitting the introduction of clearance cards or letters from other roads. They were identified. They tended to show the usage of such roads in that respect.

It is also objected that the court permitted the introduction in evidence of a rule of the company, averred in the declaration, in regard to giving a conductor a hearing and decision within five days after he was laid off for any cause.

The important part of the rule is, "If a conductor is taken off his run for any cause, he shall be granted a full investigation, hearing and decision, within five days. * * * If exonerated, he shall receive pay for lost time." It is said this rule does not apply to this case, and its introduction tended to mislead the jury. It is agreed by both sides that plaintiff was laid off in the first place, and that the cause was the indictment. We see no reason why the rule does not apply. True, the railroad officials could not determine plaintiff's guilt or innocence in law, but they could in fact, so far as they were concerned. They could determine whether the case was of such a nature that they should withdraw confidence in him, or, notwithstanding the charge, still continue to trust him. It was discretionary with them whether they would continue to let him have his run, suspend, or discharge him; but, if they suspended him, then, under their rule, they were required to give him a hearing. As before stated, the averment of this rule and refusal to give a hearing was not the gravamen of the charge. This averment was by way of aggravation, as showing the course of conduct toward plaintiff. There was no error of the court in modifying defendant's instruction on this point.

It is said all of appellee's instructions ignore the conspiracy act of 1887, S. & C., Vol. 3, p. 346, par. 73, relating to boycotting and blacklisting. We do not understand that law applies to the actionable charge of the declaration in this case. This action is not based on that statute, for reasons heretofore given. As heretofore stated, that averment was in the way of aggravation.

Objection is made to the first instruction given for appellee: 1st, because it refers hypothetically in the usual form to "a general understanding between defendant and other railroad companies not to employ a person discharged by any railroad company without a 'clearance card or letter,' as it is said there is no averment of that kind in the declaration; 2d, because it did not define what a clearance card was; 3d, because, after close of hypothetical part, it stated, "then you should find for the plaintiff and fix his damages

at such sum as you think right, not exceeding the amount claimed in the declaration," which was two thousand dollars. It is true, as to the first objection, the declaration is not as specific as it should be in that averment; but we think, outside of the conspiracy averment, that is the effect of the averment made, in stating that he could not get employment in the same line with other roads, because he could not obtain such clearance card, which he demanded in order that he might do so. There was proof of such understanding, as heretofore stated. If the averment was defective or omitted in this regard, then it is aided, and in law supplied, by the verdict, as heretofore shown. See, also, C., R. I. & P. R. R. Co. v. Clough, 134 Ill. 586; L. S. & M. S. Ry. Co. v. O'Connor, 115 Ill. 254.

The second objection is not well taken, for the reason the witnesses had defined a clearance card, and there were clearance cards or letters "in the hands of the jury, introduced as exhibits." The third objection is well taken, but, as the damages assessed are not excessive, it is evident the jury were not misled by the error.

The objection is made to the second instruction given for appellee, that it does not confine the consideration of the jury to the refusal of the railroad companies to give work, which were proven, or claimed to have been, in the conspiracy. Conspiracy was not the gravamen of the charge made in this case. It may be both plead and proven in civil actions as aggravating the wrong. *Van Horn v. Van Horn*, 20 Atl. Rep. 485. We understand it was so averred in this case, and therefore the court was not required to refer to it in this instruction.

There is a palpable error in instruction four, given for appellee, in regard to conspiracy, in using the plural "defendants" instead of "defendant and other companies," but the case and context would correct the error, and it is not considered that the jury were misled thereby.

Five instructions were given for the appellee and fifteen for the appellant, five of which were modified. Thirty-two instructions were presented by appellant, seventeen of

which were refused. Instruction twenty-one claimed to be modified, of which serious complaint is made, appears to have been given as offered, as shown by both the record and abstract. Instruction twenty, refused, was properly refused. Complaint is made of the refusal to give other instructions, but it appears, on examination, that the same thought was embodied in other instructions given for appellant. The instructions are too numerous to justify an elaborate or particular analysis here of all of them. Suffice it to say, we see no serious objection to the action of the court in passing on the instructions.

Under the evidence and the law, as we understand it, substantial justice has been done, and therefore the judgment is affirmed.

70	425
81	317

McCormick Harvesting Machine Company v. Frank Laster et al.

1. **CONSTRUCTION—Of Contracts of a Surety.**—The same rules are to be applied in ascertaining the meaning of the contract of a surety which are used in ascertaining the meaning of any other contract, although when the intention of the parties has been arrived at by the use of those rules, the liability of the surety should not be enlarged or extended by implication or construction.

2. **BONDS—To Cover the Performance of Future Contracts.**—A bond may be made to cover the faithful performance of contracts that may be made after the execution of the bond, if the intention of the parties to that effect is clearly expressed.

3. **SAME—A Bond Construed.**—A bond dated October 4, 1892, recited that on January 18, 1892, A entered into B's service as an agent, "as shown in a contract hereto annexed." The bond read as follows: "Now, therefore, if the said A shall well and faithfully discharge all his duties pertaining to the said service, as he may be instructed from time to time by the said B so long as he shall continue in his service, whether under the contract this day made, or any subsequent contract, and shall remit promptly, all money collected or received by virtue of said service, and shall, whenever thereunto required, make and give a just and true account of all moneys, property and other things which shall have come into his possession, custody or charge, by virtue of said contract hereto

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annexed and made a part hereof, then this obligation to be void, otherwise to remain in full force and effect." *Held*, that the bond was a security for the faithful performance of all duties and the remittance of all money received under the contract of January 18th, from the time of the execution of the bond, and also under any subsequent contracts entered into for the performance of the same service.

Debt, on a bond. Appeal from the Circuit Court of Hamilton County: the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed June 10, 1897.

C. S. CONGER and T. M. ECKLEY, attorneys for appellant.

T. B. STELLE, R. R. BARNETT and A. C. BARNETT, attorneys for appellees.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

This is an action on a bond executed by Frank Laster and the other appellees as his sureties, to insure the faithful performance of the contract of the said Laster as the agent of appellant for the sale of machinery, the appointment of sub-agents, and the collection of accounts. Appellant elected to stand by its declaration after a demurrer thereto had been sustained, and a judgment was thereupon rendered in favor of appellees for costs.

Two principal questions are presented for consideration: first, does the bond cover the unexpired term of the contract dated January 18, 1892, between appellant and Laster, and, second, does it cover contracts made between appellant and Laster after the execution and delivery of the bond?

1. It is contended that, inasmuch as the obligation of a surety is to be strictly construed, the bond, which is dated October 4, 1892, and refers in one clause to a contract this day made with appellant, can not be construed as applying to a contract made on the 18th day of the preceding January. This might be true if the bond contained no other reference to the contract.

But the bond recited that Laster, on January 18, 1892,

entered into appellant's service as agent, "as shown in a contract of appointment and conditions hereto annexed." The bond then reads as follows: "Now, therefore, if the said Frank Laster shall well and faithfully discharge all his duties pertaining to the said service, as he may be instructed from time to time by the said McCormick Harvesting Machine Company, so long as he shall continue in their service, whether under the contract this day made with them, or any subsequent contract, and shall remit to them promptly as they may direct, all money collected or received by him by virtue of said service, and shall, whenever thereunto required, make and give a just and true account of all moneys, property and other things which shall have come into his possession, custody, or charge, by virtue of said contract, hereto annexed and made a part hereof, then this obligation to be void; otherwise to remain in full force and effect."

Shall the words "this day made" prevail over the express statement that Laster is to account for the moneys, property and other things coming to his possession by virtue of the contract dated January 18th, which is annexed to the bond, and expressly made a part of that instrument?

If the rights of sureties were not involved, the answer would be an unhesitating no. But it seems to be argued that one construction of a contract is to be made for the principal, and another for the sureties; that by some sort of jugglery with words, the plain import of an agreement is to be made to yield to a forced and unnatural construction for the purpose of relieving sureties from their obligations.

The cases cited by counsel for appellees do not sustain this position. The same rules are to be applied in ascertaining the meaning of the contract of a surety which are used in ascertaining the meaning of any other contract; but when the intention of the parties has been arrived at by the use of these rules, the liability of the surety should not be enlarged or extended by implication or construction.

In *Shreffler v. Nadelhoffer*, 133 Ill. 536, where many leading authorities are cited and quoted from, it is said:

"It is not meant by this rule (the rule of strict construction), however, that the courts, in endeavoring to ascertain the precise terms of the contract made by a surety, may not resort to the same aids, and invoke the same canons of interpretation which apply in case of other contracts. * * * Indeed, any other mode of interpretation would lead to the absurd result of giving to the same set of words in a contract one force and meaning when the principal is defendant, and a different force and meaning when the suit happens to be brought against the surety or guarantor. The rule of strict construction, as applied to the contracts of sureties and guarantors, in no way interferes with the use of ordinary tests by which the actual meaning and intention of contracting parties are ordinarily ascertained, and forbids any extension of such liability by implication beyond the strict letter of those terms."

Applying these rules to the construction of the bond in question, we are forced to the conclusion that the sureties are bound for the faithful performance of the contract dated January 18th, from the time of the execution and delivery of the bond.

2. The declaration alleges that, after the making of the bond, other contracts were entered into between appellant and Laster from time to time, for the continuation of Laster's agency, and the question now arises whether or not the sureties are bound for the performance of those subsequent contracts. Undoubtedly a bond may be made to cover future contracts, if the intention of the parties to that effect is clearly expressed. Brandt on Suretyship and Guaranty, Sec. 144.

There are three clauses in the condition of this bond when the same is subjected to analysis, and this suit, which has been brought for a failure to remit moneys collected and received, is for a breach of both the first and the second of these clauses.

The first clause is for the faithful performance of all Laster's duties pertaining to his service under any subsequent contract, as well as under the contract then existing.

The second clause is for the prompt transmission of all moneys collected or received by virtue of said service; that is, the service under the contract then existing, or any subsequent contract, as specified in the first clause, to which reference is undoubtedly made by the use of the words said service.

The third clause is for the making of a just and true account whenever required, of all moneys, property and other things held by virtue of the contract annexed to the bond.

Does this limitation of the third clause to the contract annexed to the bond have the effect of expunging the words, "under any subsequent contract," from the first clause, or of breaking their connection with, or preventing their application to, the second clause? We think not. Even if the specific obligation to account is limited to the one contract, the obligation to faithfully perform all duties, and to remit moneys collected or received applies not only to the contract in force when the bond was made, but also to any subsequent contract entered into for the continuation of the same service.

For the error in sustaining the demurrer to the declaration, the judgment is reversed and the cause remanded.

70	429
114	4575

Cleveland, C., C. & St. L. Ry. Co. v. Marion M. Hall.

1. PLEADING AND EVIDENCE—*As to Negligence.*—In a suit for personal injuries, where the negligence charged is an order in regard to unloading timber from a car, it is proper to allow witnesses to testify as to the proper method of unloading the timbers. Such evidence does not introduce a new charge of negligence, it only illustrates the negligence of the order given.

2. INSTRUCTIONS—*Repetitions in, Not Required.*—Where the first clause of an instruction expressly informs the jury that their belief must be formed from the evidence, such instruction is not vitiated by the fact that in a subsequent part of the same instruction they are told that if they believe, etc., they will find, etc., no reference being made to the fact that such belief must be founded on the evidence.

3. *SAME—Need Not be Duplicated.*—It is not error to refuse to give an instruction stating practically the same proposition as that stated in another which is given.

4. *SAME—Should Relate to Facts Shown.*—Where there are no facts in a case on which to base a proposed instruction, it should be refused.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Saline County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

C. S. CONGER, attorney for appellant.

PARISH & PARISH, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellee brought this suit to recover damages for a personal injury caused, as alleged, by the negligence of one Hanson, foreman of a bridge gang, in which appellee was working, in giving an improper order while appellee and the other men were handling a heavy piece of timber. The facts in brief are that the men were removing timbers from a bridge. The method employed was to load the timbers on a push car, some eight feet long, supplied with a derrick, crabs, leads and ropes for hoisting the timbers on the car. This apparatus had a windlass and drum, around which drum the rope was placed several times, and a man held the loose end, who pulled on or slackened the rope as required, and was called the snub man. The other end ran through a pulley at the top of the derrick, which was some eight or nine feet in height, and then was taken out to and tied around the timber that was desired to be raised and lowered on the car. The top of the derrick could be given a slant. The raising was done by means of the windlass. When such lifting was being done the car was fastened down on the opposite side by means of a chain or iron link fastened to the iron rail of the track, to prevent the car from tipping. Two large timbers had been placed on the car and settled there so they would remain. The third timber, some thirty feet

in length, sixteen inches wide and eight inches thick, weighing about 1,000 pounds, was also lifted above the car by the derrick, but there was not room for it to securely rest on the car. Therefore one Lawrence took hold of the rope that extended from the top of the derrick down to the timber to which it was tied, and pulled the timber in so that the timber, which was held by the rope, would swing in over the car, instead of to one side, as it would otherwise do, on account of the slant of the derrick top, while one West held the snub, or other end of the rope that ran around the drum, so as to keep it taut, and Hall, the appellee, who operated the windlass and had lifted the timber, threw his knee under the windlass handle, so as to hold up the timber by the rope. When the car was so loaded it was released from its attachment to the track, and was being pushed by other men of the crew to a place beyond the bridge, where the timbers were to be unloaded. The foreman, Hanson, was following the car and directly superintending this work. When the car had about reached the place to unload Hanson ordered the car stopped, but while it was still in motion ordered Lawrence, who held in the timber over the car, to let loose and "give a hand," or words to that effect. Almost the moment Lawrence let loose of the rope, and before he could get off the car, the timber swung out, upset the car and threw both Lawrence and Hall to the ground, causing a double fracture of the thigh bone of Hall, and resulting in a permanent injury. West, the snub man, tumbled off the car backward, while Lawrence, though thrown some distance, escaped injury.

There is no claim that Hall was not acting strictly in the performance of his duty, or that he was negligent. The defense interposed is, 1, that it was the result of an inevitable accident, in that, as claimed, the rope caught in the pulley at the top of the derrick, and thus prevented the timber from dropping to the side of the car, which, as insisted, it otherwise would; or 2, that it was caused by the failure of West, the snub man, to give slack to the rope, and thus permit the timber to so drop; and if it was his fault, then it was clearly the negligence of a fellow-servant.

The evidence shows the machinery of the car was in proper condition. West is the only one who claims the rope was caught in the pulley, after the rope had slackened about one foot. In our judgment, it is clear the accident occurred so suddenly, after Lawrence let loose of the rope, that West knew nothing about the rope being caught in the pulley. He did not have time to observe the fact. There is no fact to induce the belief that the rope was caught in the pulley, at least until the car had tipped over so far as to throw the rope off the pulley, which fact, if it so occurred, in no way contributed to the accident. The accident was not caused by the negligence of West, the snub man. He was not notified, neither was it the fact that the car had arrived at the spot or place where the timbers were to be unloaded. He knew of the order to stop the car, but he also knew it had not stopped, and it was not his duty to lower away or slack the rope until the car had stopped. It was not the intention of any one to lower the timber while the car was in motion. The order given by Hanson was thoughtlessly and negligently given, and was the cause of the accident. He was the foreman, with full power to direct, discharge and employ the men, and therefore the vice-principal of the appellant, and was acting in that capacity when this negligent order was given.

There was no error committed in permitting witnesses to testify as to the proper method of unloading such timbers, by chaining down to the iron rails the opposite side of the car. The gist of the negligence charged was the order to Lawrence to let go the rope, whereby the timber was pulled in over the car, and which order resulted necessarily in the timber swinging out to the side of the car and thus upsetting it. This evidence did not introduce a new charge of negligence. It only illustrated the negligence of the order given. That is, that before swinging such a heavy timber off to one side of such a light car, the car should have been stopped and chained to the track, as was done in this case in loading, to prevent upsetting. Herein this case is distinguished from *Ebsery v. C. C. Railway Co.*, 164 Ill. 518,

and T. W. & W. Ry. Co. v. Foss, 88 Ill. 551, cited by the learned counsel for appellant.

Objection is made to the sixth instruction given for appellee on the ground that, while it directs, in the first part, that the jury must "believe from the evidence," in a subsequent part, on a vital fact, it directs, if they "believe," etc.

What is said in *Miller v. Balthasser*, 78 Ill., at p. 305, is applicable to this objection: "The first clause of the instruction expressly informs the jury that their belief must be formed from the evidence, and while the same is not repeated in the latter clause, a jury composed of sensible men could not infer that they had the right to travel outside of the record in search of proof upon which to form a verdict."

There was no error committed in refusing to give instruction marked number one, refused, of defendant, to the effect that if the car was upset by reason of the pulley in derrick failing to work from some unforeseen cause, that could not by reasonable diligence have been discovered, then the jury should find for the defendant. The thought of this instruction was embodied in the language of instruction number nine, given for defendant, relating to an unforeseen accident. While the instruction does not mention the pulley or the rope failing to run through it, yet it could refer to nothing else developed from the evidence in the case.

Instruction number two offered by defendant was properly refused. It related to the doctrine of fellow-servants.

There were no facts in this case on which to base it, as presented in that instruction.

The injury resulted from the negligent order, not negligent act, of Hanson.

The judgment is affirmed.

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90 558
90 590

James Mahon v. W. L. Gaither.

1. **PROMISSORY NOTES—Assigned After Maturity—Want of Consideration as a Defense.**—A person who purchases a promissory note after it is due takes it subject to the defense of a want of consideration, even though he gives full value.

2. **APPELLATE COURT PRACTICE—Where Instructions do not Appear in the Abstract.**—Where the instructions do not appear in the abstract this court will decline to consider objections to them made in the briefs.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Wayne County; the Hon. CARROLL C. BOGGS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

LEEDS & RAMSEY and HANNA & HANNA, attorneys for appellant.

CREIGHTON, KRAMER & KRAMER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellant to recover the amount of a note given by appellee to E. A. & J. A. Ford, for the sum of \$65, with seven per cent interest, dated January 28, 1892, payable six months after date, and indorsed, "Pay to James Mahon, without recourse. E. A. & J. A. Ford." Appellant claims to be an assignee of this note before maturity, and that, as such, he is entitled to the benefit of the last clause of Sec. 9, Chap. 98, Rev. Stat., Starr & Curtis, which provides, "that nothing in this section contained shall be constructed to affect or impair the right of any *bona fide* assignee of any instrument made assignable by this act, when such assignment was made before such instrument became due."

This case was once before us on appeal, Mahon v. Gaither, 59 Ill. App. 583, and upon the record, as it then appeared, we held, and so said in the opinion, "Appellant did purchase this note before maturity and paid for it its full value, without notice of any fraud, or failure or want of consider-

Mahon v. Gaither.

ation as against him. Appellee can not set up and maintain the defense that no consideration was given for the note sued on." The evidence in that record justified the conclusion so announced, but in the record now before us the facts proven are quite different. Appellant alone testified that he bought the note of one Risley, who was a partner of the payees; that he thinks it was six months before the note became due, and afterward says the note was fifteen or twenty days old when he bought it; that the consideration he gave was a credit which he made on a note he held against Risley; that Risley guaranteed the payment of the Gaither note, and without such guaranty he, Mahon, would not have bought it. He further testified the note "was never out of my possession until I sent it to Ed. Bonham's bank for collection;" that "Ed. McManaman never had this note; if he had, it was before I bought it;" "have no recollection of either McManaman or Risley having this note after I bought it." U. S. Staley was the next witness for appellant, and he testified his bank "received note from First National Bank, of date July 9th, from L. A. Goddard, cashier, Mt. Carmel, Illinois; drawer of the note is E. A. and J. A. Ford, payor is W. L. Gaither, date January 28, 1892; payable six months after date, due July 28, '92; amount \$65 and interest; returned December 8, 1892."

William Bonham, the only other witness for appellant, testified he got a letter from Mahon inclosing the note, in January, 1893, with directions to sue it. I brought suit in April, 1893; I put in, "Pay to James Mahon," and filled up the blank indorsement.

Crews, for defendant, testified that in April, 1892, Risley had the note and tried to sell it to him; Powell, for defendant, testified Risley came to his place of business and offered to trade a note on Gaither for harness, in March or April, 1892. Gillison, for defendant, testified that about March 3, 1892, he was present when a chattel mortgage was given and a settlement was made between the Ford boys and Gaither, and two notes were delivered to Gaither; there were three notes spoken of; that he afterward, about the last of April, or first of May, saw a note, similar to the two

which had been delivered, which was for \$65, payable to the Ford boys in six months after date, signed by W. L. Gaither, in the possession of Risley. Petty, for defendant, testified he saw the note, at the same time witnesses Crews and Powell spoke of, in the possession of Risley, who claimed to own the note, and wanted to trade it to witness. Moore, for defendant, testified he saw Ed. McManaman at Gaither's house in December, or first of January, but thinks it was in December, 1892, that McManaman had a note for \$65, signed by W. L. Gaither, payable to the Ford boys, six months after date; that he wanted to sell it to Gaither, who declined to buy it, and offered to sell it to witness. Forbes, for defendant, testified that in December, 1892, Risley came to him and had a note for \$65, signed by Gaither, payable to the Ford boys; he offered to trade me note for a horse I was trying to trade off.

This evidence, introduced on behalf of defendant, and the evidence of Staley and Bonham, given on behalf of appellant, directly contradicts the testimony of the latter on the material questions at issue. If these witnesses for defendant were entitled to credit, the note in question was not in the possession of appellant in March, April, May and December, 1892, but Risley then had it and was trying to sell it or trade it off; and in December, 1892, or January, 1893, McManaman had the note and offered it for sale. Moreover, Staley testified that on July 9th his bank received this note from L. A. Goddard, cashier First National Bank, Mt. Carmel, for collection, and returned it December 8, 1892; and Bonham testified he put in the blank indorsement, "Pay to James Mahon," after he received the note from Mahon for collection, in January, 1893. From all this evidence the jury were warranted in their conclusion that appellant was not the "*bona fide*" assignee of the note before it came due, and took it subject to the defense of a want of consideration, which the evidence clearly established.

No instructions appear in the abstract, hence we decline to consider the objections made to same in the brief.

No good reason appearing for the reversal of the judgment, it is affirmed.

**German Insurance Co. of Freeport, Ill., v. Joseph
L. Denny.**

1. **INSURANCE—Forfeiture of Policy for Non-Payment—Partial Payments After Forfeiture.**—Where a contract of insurance against loss by fire or wind provides that failure to pay a premium note shall work a forfeiture of the policy, but that after such failure the insured shall have the right to make payment and revive the policy, the acceptance of partial payment waives nothing, and if a loss occurs before full payment the insured can not recover.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Hamilton County; the Hon. EDMUND D. YOUNGBLOOD, Judge, presiding. Heard in this court at the February term, 1897. Reversed without remanding. Opinion filed June 10, 1897.

J. WILSON JONES, attorney for appellant.

WEBB & LANE, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

On December 18, 1893, appellant issued its policy of insurance to appellee to cover any loss happening by fire or wind storms, to the extent of \$600. The sum of \$300 of insurance was placed on a dwelling house, which, on May 27, 1896, was damaged by a wind storm to the extent of \$57.10. The policy did not expire until December 15, 1898. At the time the application was signed by appellee he also signed a note, payable to the company, for the sum of \$18, due January 1, 1895, which note and policy contained the following clause: "If this note is not paid at maturity, said policy shall then cease and determine and be null and void, and so remain until this note shall be fully paid and received and accepted by the company as provided in said policy." The policy itself further provides that "no legal action on the part of this company to enforce payment shall be construed as reviving the policy. The payment of the premium, however, revives the policy and makes it good for

the balance of its term." The note was not paid when due, and not paid in full until the day after the loss, which occurred on May 27, 1896. The sum of \$10 was paid on the note November 10, 1895, and the agent of the company at that time, by indorsement on the note, extended payment until December 1, 1895. There was no other definite extension of the time. In fact there was no other extension. The appellee claims that the agent stated to him that he would extend the time, without stating how long, if appellee would aid the agent in some canvass he was making for a county office. But of course appellee must have known that the agent had no legal or moral right to grant an extension on such grounds, if, in fact, he had any authority to grant any extension. At the time the balance of the note was paid, the day after the loss, appellee did not at the time inform the agent of his loss. If he had it would have been immaterial, for the only effect of the payment, by the terms of the note and the policy, was to revive the policy from the time of payment "for the balance of its term."

The case of *Carlock v. Phoenix Ins. Co.*, 133 Ill. 210, is, in its facts, as to the point under consideration, much like the one in hand. There a distinction is made between a policy where a forfeiture is worked by failure to pay the premium note, without any right of revival by subsequent payment, and a policy like the one here in suit. In the former case payment after forfeiture, and retention of the money, works an estoppel to claim any forfeiture, while under policies like this the person insured has the right to revive the policy by payment, from the time of payment, which payment it is the duty of the company to receive. As in the *Carlock* case is stated, "The receipt of partial payment of the note waived nothing." The only effect of full payment was to revive the policy for the residue of the term.

In view of what has been said, it is unnecessary to consider the errors assigned. There can be no recovery in this case, and therefore the judgment is reversed, without remanding.

John W. Durbin v. Lillie Durbin.

1. **VERDICTS**—*Not Sustained by the Evidence.*—Much as a court of appeal may dislike to reverse a decree upon the ground of want of evidence to support the verdict upon which it is based, they will feel constrained to do so where, as in this case, the verdict is opposed to a clear preponderance of the evidence.

Bill for Divorce.—Appeal from the Circuit Court of Fayette County; the Hon. R. B. SHIRLEY, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed June 10, 1897.

F. M. GUINN, attorney for appellant.

ALBERT, WEBB & SPURGEON, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellant filed his bill for divorce against appellee, charging her with adultery, since their marriage, with one Edward Montgomery and with one Grant Bethards; alleging the marriage took place January 16, 1894, and the parties lived together until about December 1, 1895; that defendant left him on said date, and about twenty days prior to the first day of the last term of this court, she instituted a suit for separate maintenance, and upon the trial thereof it was decreed by the court that he should pay her \$10 per month, which he has done; that the fact she had committed adultery, as charged, was unknown to complainant at the last term of this court; prays for divorce and to set aside decree for separate maintenance. Answer and replication were filed, and the issue of fact was tried by a jury. They returned a verdict finding defendant not guilty, and complainant's motion for a new trial was overruled and a decree was thereupon entered dismissing the bill and awarding all the costs against complainant. He took this appeal and asks that said decree be reversed.

We think the court erred in denying the complainant's

right to ask defendant certain questions on cross-examination, but are further of the opinion that the verdict was not supported by the evidence. Grant Bethards was the uncle of defendant, and testified to several acts of illicit intercourse with defendant, since her marriage with complainant, and Logan Bethards testified to having seen Grant and defendant in the act of carnal intercourse. Whatever the jury might have thought of the conduct of Grant, leading them to doubt his testimony, nothing appears to justify them in disregarding the testimony of Logan Bethards. Edward Montgomery testified to having had carnal connection with defendant several times since her marriage, and Finies Akeman testified he had seen Montgomery and defendant in the very act of sexual intercourse. As against the evidence of these four witnesses, showing repeated acts of adultery by defendant, she, by her own testimony alone, contradicts them. Hence, much as we regret to reverse a decree upon the ground of a want of evidence to support the verdict on which it is based, we are constrained in this case to do so, holding the charge of adultery was proved by a clear preponderance of the evidence, that appellant did not learn of such adultery until after the suit for separate maintenance was decided, and the court erred in denying the motion for a new trial.

The decree is reversed and the cause remanded.

**Henry Mann and Isabella Mann v. Elizabeth
Jobusch et al.**

1. **MORTGAGES**—*When Deeds, Apparently Absolute, Will be Held to Be.*—A deed, once a mortgage is always a mortgage, and the true test in determining whether a deed absolute on its face will be held to be a mortgage is, what was the real intention of the parties? Parol evidence may be resorted to to determine the real intention, and courts will look into the whole transaction and consider all the attending circumstances to determine the intent.

2. **SAME**—*Presumptions Regarding Deeds Apparently Absolute.*—A

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deed absolute in form is, in law, presumed to be a deed until clearly proved to be a mortgage; and where a deed is given by a mortgagor to the mortgagee, the fact that the debt is canceled and the mortgage released, and at the same time a contract for a reconveyance executed by the mortgagee, is evidence tending strongly to show that the deed was not intended as a new mortgage.

3. *SAME—How Presumption that Deed was Intended as a Mortgage May be Rebutted.*—Where a deed has been given by a mortgagor to a mortgagee, and at the same time a contract for reconveyance executed, any presumption that may arise that the transaction amounts to a mortgage may be rebutted by facts showing that the debt was surrendered and canceled at the time of the conveyance.

4. *LACHES—As a Bar to Equitable Relief.*—A deeded certain land to B, who sold it to C, C took possession and made improvements without any notice of a claim by A that the deed was a mortgage. A allowed him to rest under the belief of the *bona fide* of his purchase for over five years without taking any steps to enforce such claim. *Held*, that under the circumstances of the case this delay was unreasonable and that A was not entitled to relief.

Bill, to redeem from an alleged mortgage. Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

BENJAMIN W. POPE, attorney for appellants.

JOSEPH W. RICKEET, attorney for appellees.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The appellants, in April, 1895, filed their bill to redeem certain lands from an alleged mortgage. In 1875 they had made a mortgage to one Feltmeyer on this land, which mortgage, with the note, had been sold and assigned to Elizabeth Jobusch. The mortgage not being paid when due, on the 16th day of March, 1888, appellants made a deed to Elizabeth Jobusch the note representing the indebtedness held by her was surrendered, the mortgage released and a contract for a deed was made by Elizabeth Jobusch to Henry Mann, to be executed March 1, 1890, when the sum of \$1,400, with eight per cent interest, was to be paid by Henry Mann to Elizabeth Jobusch, which

contract was unilateral and not signed by Henry Mann. Time was made the essence of the contract. The sum of \$90 was paid as interest the first year of the running of said contract, and thereafter there was default. On the 6th day of June, 1890, Elizabeth Jobusch made a deed of said land to Ernest Mann, in consideration of the sum of \$1,400. Henry Mann and wife lived on the land at the time of all these transactions, but on September 17, 1890, moved to the city of DuQuoin, and rented the land to one Williams until March 1, 1891, who went into possession and remained there until in February, 1891, when he moved away, and Ernest Mann then moved in and has been in possession since that time.

The appellants claim that the deed made by them to Jobusch was in the nature of a mortgage, and that it was so understood. They also claim that the grantee so recognized it by subsequent declarations and acts, which are denied by appellee. Soon after June 6, 1890, Jobusch notified Henry Mann of the sale to Ernest Mann and that he must give up possession March 1, 1891. He went to see Mrs. Jobusch and tried to get her to cancel the sale, but she replied that the deed was made and that it was too late. The evidence shows there were ninety acres of land in the tract, and that sixty-two acres of it were in cultivation, and the residue in timber. The value of the land is variously estimated by different witnesses, those for the appellants estimating it from \$25 to \$35 per acre, while those for the appellee fixed the value at from \$15 to \$20 per acre for the improved part and \$10 per acre for the unimproved. The evidence is uncontradicted that Ernest Mann had no personal knowledge of the claim of Henry Mann, that the deed by him to Jobusch was a mortgage; until the bill in this case was filed in April, 1895. The tender of the money for redemption—\$2,280—was not made until March or April, 1895.

It is the law, as claimed by appellant's counsel, that a deed, "once a mortgage is always a mortgage," and the true test is, what was the intention of the parties? that parol evidence may be resorted to to determine the real intention,

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notwithstanding the form of the instrument; that courts will look into the whole transaction and consider all the attending circumstances to determine the intent. These are familiar principles, and no citation of authorities is required in their support. It is also the law, as claimed by appellees' counsel, that a deed absolute in form is, in law, presumed to be a deed until clearly proved to be a mortgage, and the fact that a deed is given by a mortgagor to the mortgagee, the debt canceled, and the mortgage released; and at same time a contract of sale given is evidence tending strongly to show an actual repurchase. *Bears et al. v. Ford*, 108 Ill. 17. In fact, in *Rue v. Dale et al.*, 107 Ill. 282, quoting with approval *Jones on Mortgages*, it is said :

“ If the conveyance extinguishes the debt, and the parties so intended, so that a plea of payment would bar an action thereon, the transaction would be an absolute sale, notwithstanding the contemporaneous contract to recovery on being reimbursed, within an agreed period, an amount equal to the debt and the interest thereon.” Citing another section from the same author, it is said, “ that whatever presumption may arise that the transaction is a mortgage, where a deed has been given, and at same time a contract for reconveyance once executed, may be repelled by any facts showing that the debt was surrendered and canceled at the time of the conveyance.”

It will be observed in this connection that Henry Mann did not sign the contract under which Elizabeth Jobusch agreed to make a deed in the payment of \$1,400, so that the contract did not revive the original debt, but it was in the nature of the agreement referred to in the Dale case, *supra*, that is, to make the deed on being reimbursed, within an agreed period, an amount equal to the debt and interest.

In addition to this view, the proof is that Ernest Mann went into possession and made improvements on the land without any actual notice of the claim that the deed was a mortgage; and Henry Mann allowed him to rest under the belief of the *bona fide* of his purchase from 1890 to 1895, without taking any steps to enforce such claim, or to notify

him of such claim. Under the circumstances of this case this delay was unreasonable. *Turner v. Littlefield*, 46 Ill. App. 169; *McHany v. Schenk*, 88 Ill. 357; *Breit v. Yeaton*, 101 Ill. 271. As is said in one of the cases, a man can not lay by and speculate on the appreciation of values in that way. All know that land values increased greatly between 1890 and the early part of 1895.

Our conclusion is that the papers on their face showed a conveyance by Henry Mann to Elizabeth Jobusch, in satisfaction of the mortgage debt; that the contract back to Henry Mann was not a revival of the debt, but an agreement to reconvey on payment of an amount equal to that debt by Henry Mann, but which amount he did not obligate himself to pay by said instrument; that Mann was guilty of *laches* by his long delay in making this claim known, after notice in June or July, 1890, that Ernest Mann had purchased the land; that by moving off the place in September, 1890, and renting it to Williams only until March 1, 1891, and then paying no more attention to his interests, if he had any, might well, with the other evidence in the case, have induced the court below to find, as a matter of fact, that the deed was absolute, or that as to Ernest Mann he was guilty of such *laches* as would bar him of relief.

The decree is affirmed.

Perry County Coal Mining Company v. J. D. Maclin.

1. VERDICTS—*Sustained by the Evidence.*—The court holds in this case that the evidence in the record shows that the plaintiff proved by a preponderance of the evidence, all the material facts necessary to entitle him to recover, and that the verdict of the jury must stand.

Trespass, for undermining land. Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

R. W. S. WHEATLEY, attorney for appellant.

BENJAMIN W. POPE, attorney for appellee.

Parks v. Rector.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

Appellee brought this suit in trespass against appellant to recover damages for injury to his land by undermining the surface thereof so that it became and was broken, fallen and sunken in many places, to the great injury of said land. The jury returned a verdict finding defendant guilty, and assessing plaintiff's damages at \$25. Defendant's motion for a new trial was overruled and judgment was entered for plaintiff on the verdict. Defendant took this appeal. The rulings of the court, objected to relate to the admission of evidence, and we find no error in this regard. But no objection is made to the instructions, and the only other point relied on for reversal is that the evidence does not sustain the verdict.

We have carefully examined all the evidence in the record, and find the plaintiff proved, by a preponderance thereof, all the material facts necessary to entitle him to recover, viz., that plaintiff owned and was in possession of the land described in the declaration, and defendant owned the coal under the surface, with the right to mine and remove the same; that in mining and removing said coal, it undermined and caused to fall and sink at least three-quarters of an acre of the surface, by reason of taking out all the coal, leaving no pillars or supports to prevent such sinking, and the damage to plaintiff for the injury so occasioned was at least the amount recovered.

The judgment is affirmed.

H. M. Parks v. J. R. Rector and Harriet Mayer.

1. VERDICTS—*On Conflicting Evidence.*—The evidence, on all the material questions of fact involved in this case, was conflicting, and the verdict of the jury is conclusive of the controversy.

Trespass, for a wrongful levy. Appeal from the Circuit Court of Williamson County; the Hon. OLIVER A. HARKER, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

CLEMENS & WARDER, attorneys for appellant.

W. W. DUNCAN, attorney for appellees.

MR. JUSTICE SCOFIELD DELIVERED THE OPINION OF THE COURT.

By virtue of an execution issued on a judgment in favor of Scudder & Co. against J. A., J. V. and J. L. Mayer, the appellant, who was sheriff of Williamson county, levied on the interest of Harriet E. Mayer, wife of J. N. Mayer, in a restaurant stock owned by her and one Rector, the appellees herein, who were doing business under the firm name of Rector & Co.

This action was brought by appellees to recover damages for injury to the stock while in the sheriff's hands. The damages were assessed by the jury at \$150.

Appellant contends that the interest of Harriet E. Mayer in the stock of goods came to her as the result of fraudulent transfers made for the purpose of hindering and delaying her husband's creditors; also that her interest in the stock was not purchased with her separate property; also that her husband had control of the property and mingled his earnings and labor therewith so that what was his could not be distinguished from what was hers; and that, on either of these grounds, the wife's interest in the property could be taken for the husband's debt.

The evidence on these propositions and all other material questions of fact was conflicting, and the verdict of the jury in favor of appellees is conclusive of the controversy.

The instructions, though subject to criticism, announce the law with substantial accuracy, and the jury could not have been misled thereby.

The judgment is affirmed.

Meguiar, Yancey & Co., for Use, etc., v. James L. Rainey.

1. VERDICTS—*On Conflicting Evidence.*—After a careful examination of the whole record in this case, the court is unable to say that the verdict is wrong, and the judgment is therefore affirmed.

2. PROMISSORY NOTES—*Given as Receipts for Money to be Used for the Benefit of the Payee.*—In a suit on two promissory notes, the defendant filed a special plea, averring in substance that the notes represented moneys advanced to the defendant as the agent of the plaintiffs, to be expended in purchasing goods for them, and that the notes were given merely as receipts for these moneys, which were thereafter expended by defendant in purchases in accordance with the terms of the agency. *Held*, that the plea set up a good defense.

Assumpsit, on promissory notes. Appeal from the Circuit Court of Jackson County; the Hon. JOSEPH P. ROBERTS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

R. J. McELVAIN, attorney for appellant.

HILL & MARTIN, attorneys for appellee.

MR. JUSTICE SCHOFIELD DELIVERED THE OPINION OF THE COURT.

Meguiar, Yancey & Co., for the use of P. Meguiar, sued appellee for the balance alleged to be due on two promissory notes for the principal sums of \$1,000 and \$500, dated respectively December 31, 1887, and January 14, 1888, and each payable four months after the date thereof. Appellee pleaded *non assumpsit*, want of consideration, payment, and a special plea in which it was averred, in substance, that the notes represented moneys advanced to appellee as the agent of Meguiar, Yancey & Co., to be expended in purchasing tobacco for them, and that the notes were afterward given merely as receipts for these moneys, which were thereafter fully expended by appellee in purchases and shipments of tobacco, in accordance with the terms of the agency.

To the contention of appellants that it was error for the

court to admit evidence of the facts set forth in this special plea, there are many satisfactory answers, among them the fact that the plea was not demurred to, but was traversed by appellants and made the basis of one of the issues in the case, and the further fact that the exceptions are not set forth in the record with sufficient definiteness to authorize the consideration of the question. Besides, we are unable to see why the plea is not a good one, as appellants admitted when they traversed it; and we can not concede that proof of the averments of the plea is a violation of the rule of law prohibiting the contradiction of a written contract by parol evidence.

The principal point made by appellants is that the verdict is manifestly against the weight of the evidence. Appellee testified to facts which, if true, sustain his special plea as a defense to the action. On the other hand, appellants read in evidence the depositions of four witnesses, who state that appellee bought the tobacco on his own account and that the money represented by the notes was a loan.

When the depositions are carefully examined, however, it appears that not more than two of the four deponents claim to have personal knowledge of the transaction concerning which they testify.

It is claimed, however, by appellants, that the contract was consummated by letter, and that the correspondence between the parties prior to March, 1890, shows that appellee was doing business for himself, and not as appellant's agent, in making the purchases. It is said that these letters were destroyed by the cyclone in March, 1890, and it is not claimed that appellee wrote any such letter after that date. On the other hand, appellee denies that he ever wrote any such letter, or that the contract was consummated by correspondence. In support of appellee's testimony, it is worthy of remark that appellants made no request for the payment of the notes for five years after 1891; that business men would not ordinarily lend money to a stranger, twenty-three years of age, with which to embark in business, especially when the stranger was poor and offered no security;

Fort Chartres D. & L. Dist. v. Smalkand.

but that they might advance money to him with which to make purchases for them, knowing that the property, when purchased, would be theirs.

These, and other considerations, doubtless had weight with the jury in their decision of the case. After a careful examination of the whole record, we are unable to say that the verdict is clearly wrong.

Even if the evidence as to what the tobacco was worth was improper, the error was not prejudicial.

There is no error in the instructions.

The judgment is affirmed.

Fort Chartres and Ivy Landing Drainage and Levee District Number Five v. Alphonse Smalkand.

1. **VERDICTS—*Against the Weight of the Evidence.***—The verdict in this case is clearly against the weight of the evidence, and the judgment rendered in pursuance thereof must be reversed.

2. **DRAINAGE DISTRICTS—*Power of Commissioners.***—The commissioners of a drainage district have limited and special powers which they can only exercise in accordance with the drainage act.

3. **SAME—*Assessments.***—Before an assessment can be made on land comprising a drainage district, the commissioners must determine the probable cost of the proposed work, and present to the court that appointed them a petition setting up their conclusions, together with plans, specifications, etc., when a hearing on notice must be had.

4. **SAME—*Power to Contract.***—Sections 28 and 36 of the drainage act are to be construed in connection with the preceding sections; they do not modify the preceding restrictions upon the power to contract, but only grant the power to contract in subordination to such restrictions.

Assumpsit, on the common counts. Error to the Circuit Court of Monroe County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1897. Reversed without remanding. Opinion filed June 10, 1897.

CHARLES MORRISON and TEAVOUS & WARNOOK, attorneys for appellant.

SLATE, BOLLINGER & WINKLEMAN, attorneys for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

The plaintiff in error had a contract with the firm of Schilling & Hank to make some large ditches with a dredge, to cost several thousand dollars. It required a large quantity of water to float the dredge boat, and in order to obtain it Schilling shut down a flood-gate at the mouth of "Mill Race Ditch," without the consent of the commissioners. High waters came, overflowed the lock, and damaged the foundation. Schilling attempted to open the gate, but, on account of the pressure of the water, or for some other cause, it could not be raised, and thereafter, in the night time, it was blown up by dynamite, by whom, the evidence does not disclose. The firm agreed to restore the gate and lock to its former condition, and for this purpose they entered into a written contract with the defendant in error, drawn up by one of the drainage commissioners, and signed by the parties—the firm and defendant in error—November 12, 1892, which is too long to set out here. The effect of the contract was, first, that the work was to be done under the supervision of the commissioners, or their superintendent; second, that for certain specified work defendant in error was to receive the sum of \$975; third, he was, further, "to put in or under or about such lock a good and sufficient concrete * * * and rock * * * about said lock as said commissioners may require to put said lock in as good condition, in their judgment, as it was before the high water of 1892," and for such concrete work was to receive \$6.50 per cubic yard, and was to receive a reasonable price for all the work. Then the kind of material to be used is described and how to be prepared, which was to be subject to the inspection of the commissioners. Fourth, "And said contractor shall be allowed a reasonable price for all extra work not above specified; that is to say, for the extra work of pumping water * * * for bridge work * * * and for repairing the concrete foundation under the pillars or abutments, as the case may be; or for any other extra work said contractor may do or cause to be done under or about

said lock." The commissioners had paid Schilling & Hank over \$1,000 for work on the ditches, and held back about \$2,800 until they repaired the lock. It appears that at the time the above contract was made it could not be definitely determined what the condition of the injured lock was, on account of the water, but when that was pumped out, the foundation was found to be so injured that piling had to be driven and a concrete foundation made on them, and also it was determined to deepen the foundation at one part some two feet. As Schilling could not be present, he requested Mr. Hardy, one of the commissioners, to look after his interests. The defendant in error began work under his contract with Schilling & Hank, but claims it was soon interrupted by changes made by verbal direction of Hardy, especially as to the piling, which was not specifically mentioned in the contract. He requested a written order, as to the piling, from the commissioners. Thereupon the commissioners entered of record an order, of which a copy was given him, to do said piling so as to make the necessary foundation "for the new piers to be built by Alphonse Smalkand, under his contract with Schilling & Hank, * * * to repair said lock." He also claims that the deepening of the foundation some two feet was extra and outside the contract. The items, as presented on his bill for extra work, outside of the contract, were \$947.70 for concrete, \$423.50 for masonry, \$34 for extra work on rip-rap, and \$650.50 for piling, and some other items, making a total of \$2,915.50. He also did the specified work in the contract, amounting to \$975, which was paid, making a total of work \$3,890.50. On what he calls extra work, he received from the district \$2,000 in bonds, which were discounted \$200, which, as he says, the district was to bear, leaving a net payment on the whole extra work of \$1,800, making still due him \$1,115.50. The payments made by the commissioners were made under a written order of Schilling, of date December 20, 1892, on the commissioners, to pay Smalkand in "bonds of the district, on account of repairing the Mill Race Lock, in such

amount as said board of commissioners may deem safe and proper on such work, and at such time as they may consider proper, on my account." Under this order the commissioners paid to Smalkand \$3,000 in bonds for this work, which was more than the balance owing to Schilling & Hank under the original ditch contract. Therefore the commissioners refused to pay Smalkand any more bonds, claiming his contract was with Schilling & Hank, and not with them. Hence this suit.

There is no claim that the commissioners made a contract with Smalkand, and the fact is, no contract was made by them. The claim is that Hardy, one of the commissioners, ordered certain work to be done, which is called extra, and that he, and another commissioner, verbally stated the district would pay for it. The commissioners claim all the work was done under the contract and that they never promised, verbally or otherwise, to pay for any of it, except to the extent of the balance due Schilling & Hank.

Smalkand obtained a judgment for \$1,099.50. The principal contentions are that the judgment is not supported by the evidence; that the verdict on which it is based was obtained by erroneous instructions, which misled the jury; that under the law the commissioners had no legal right to create such a debt in the manner in which it is claimed this alleged debt was created.

The record has been carefully examined, and without going into an extensive analysis of the evidence in this opinion, suffice it to say that all the work done by Smalkand was under the contract he had with Schilling & Hank, except possibly deepening a part of the foundation, which it is said, owing to the customary way of measuring such work, did not add to the cost. The terms of the contract between Schilling & Hank and Smalkand show that the concrete and masonry work was included, and when the water was pumped out, the conditions disclosed showed that it was necessary to drive piling to make a foundation for the concrete. The written order of the commissioners was notice to Smalkand that he was doing that piling work

under the contract. The contract by its terms covers all extra work necessary to place the lock in its former condition, which was destroyed substantially by Schilling & Hank. All such work, which Smalkand calls extra, is as clearly covered by the contract as the specified work, amounting to \$975. The reason that amount was specified was that it was above the water at that time, while much of the other work was not, and therefore could not be specifically agreed upon.

There is no evidence that the commissioners ever, at a meeting or otherwise, agreed to make such repairs at their expense, or had a contract with Smalkand to do the work. The contract referred to sufficiently shows that the district was not to pay for repairing the lock. We are unable to find a basis for Smalkand's claim against the district on the facts.

In addition to this conclusion, if the facts were that the commissioners had made a verbal contract with Smalkand to do the work, there could not, in law, have been a recovery, under the authority of *Badger et al. v. Inlet Drainage District*, 141 Ill. 540. In that case the district was organized and the assessments made and confirmed in November, 1879. Afterward, on June 1, 1882, the commissioners made a contract with the firm of H. E. Badger & Son, whereby their dam across Inlet Creek, with the mason work, etc., were to be removed by said firm for the sum of \$1,700, and to pay the same the commissioners made an assessment on the land and also issued seventeen orders for \$100 each, and delivered the same to the firm. In that case it was held there could be no recovery, for the reason that the commissioners had limited and special powers which they could only exercise in accordance with the drainage act; that by Sec. 9 of the said act, the commissioners shall first determine the probable cost of such work; by Sec. 11, they shall present to the court that appointed them a petition setting up their conclusions, together with plans, specifications, etc., when a hearing or notice should be given.

It is said: "The statute will be searched in vain for

authority for the commissioners to do any act materially affecting the character, extent or cost of the improvement, as to which there is not provided that there shall be notice to the land owners affected, and opportunity for them to be heard." It is further held that the power to contract and be contracted with, given by Sec. 28, is in subordination to the restriction mentioned, and the same is held to be true of Sec. 36, which gives the commissioners power to "do any and all acts that may be necessary in and about the surveying, laying out, constructing, repairing, altering * * and maintaining any drain, ditch, levee or other work for which they shall have been appointed, including all necessary bridges, * * * dams, side drains, etc., any may use any money in their hands arising from assessments for that purpose." It is also said, "it is still further manifest that this section (36) is but an additional limitation or restriction and not an enlargement of the powers intended to be conferred by Sec. 28, by the provisions which follow the language quoted, regarding public lettings in certain cases, to the lowest bidder," etc.

Reference is also made to the restrictions imposed by Sec. 37, of the amendatory act of 1885, Starr & Curtis, Vol. 3, p. 422, which, as will be observed, gives the commissioners power to use the money raised by assessment "for the purpose of constructing or repairing * * * any ditch, * * levee, etc., * * * within such district. Provided that the commissioners shall use such money under the direction and approval of the court;" and that assessments may be made "when it shall appear to the court" to be necessary "for the maintenance and repair" of such work. This section further provides, as by Sec. 9 of the original act, that the commissioners shall present the matter by petition to the court with estimates, specifications, etc., upon which, after notice, a hearing shall be given. It will be observed the law applies to repairs, at least where \$500 expenditure is involved, if not to less amounts, as well as to construction, so far as petition, notice and hearing is concerned. In fact, amendatory Sec. 37 seems to require the

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approval of the court as to the expenditure of all sums for repair or construction. It is evident the legislature intended to surround the fund raised with safeguards to prevent its loss, and, as indicated by the Badger case, the courts are not inclined to allow any laxity in the creation of debts by the commissioners.

Counsel for defendant in error are mistaken in the position that the law allows commissioners to make repairs for an unlimited amount. The restrictions, as shown by the statute above quoted, are the same as to repairs as to the construction, so far as the claimed liability in this case is concerned. In the Badger case it is also held that the doctrine of estoppel will not apply where the statute is not followed in the creation of the debt.

For these reasons the judgment is reversed and not remanded.

Robert C. Lambe v. Fred. Heitmeier.

1. ***GUARANTY—Of a Debt Payable from a Particular Fund—When the Right of Action Accrues.***—Where one promises to pay the debt of another out of the funds of such other, or that if he does not get the funds that he will pay it anyway, the right of action does not accrue till the promisor receives the funds, or until it becomes certain that he will not receive such funds.

Transcript, from a justice of the peace. Error to the County Court of Clinton County; the Hon. JESSE JONES, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed June 10, 1897.

HUGH V. MURRAY, attorney for plaintiff in error.

DARIUS KINGSBURY, attorney for defendant in error.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was commenced by Heitmeier in justice's court, and tried on appeal in the County Court, where, by agree-

ment a jury was waived, and upon trial the court found for plaintiff and entered judgment on the finding for \$32.10 damages and costs of suit. The subject-matter of this suit was \$2.50, the price of a pair of shoes ordered by Lambe for James A. White, and delivered to White, on such order, by Heitmeier, and a note dated June 19, 1894, for \$27.50, payable one day after date, at five per cent, signed James A. White. Lambe was employed by White to represent him and collect for him money due as his share of an estate in Pennsylvania. It is claimed by Heitmeier that Lambe became liable to pay said note, by reason of a promise made by him to pay the same, in consideration of the dismissal of a former suit brought against him by Heitmeier for the price of the shoes and the payment of costs of said suit, and Lambe contends his promise was to pay out of the proceeds of White's share of the said estate, when collected, and that nothing had been yet collected, but the estate had been settled and White's share would soon be collected; that hence the suit was prematurely brought, so far as the note is concerned. The evidence upon this branch of the defense was conflicting, Heitmeier alone testifying the promise was unconditional, and Lambe and the justice testifying that the promise was to pay out of said share of White when collected, and the further fact was proved that said share would soon be collected.

The memorandum of the justice purporting to be the agreement of the parties as to said promise, was erroneously admitted in evidence. It was not full or correct. If the promise to pay the note had a good and valuable consideration to support it, but was upon the condition that such payment was to be made out of the money Lambe should collect for White, and the evidence showed such money could be collected, the suit was brought too soon. *Snell et al. v. Cheney*, 88 Ill. 258; *Michaells v. Wolf*, 136 Ill. 71, and the court erred in refusing to hold, as requested by defendant, the following proposition to be the law: "Where one promises to pay the debt of another out of the funds of such other, or if he does not get the funds that he will pay

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it any way, the right of action does not accrue till the promisor receives the funds, or until it becomes certain that he will not receive such funds." For the error in refusing to hold this proposition to be the law, the judgment is reversed and cause remanded.

J. M. Evans v. J. M. Pierce.

1. *AGENCY—The Law as to the Existence of the Relationship of Principal and Agent Applied.*—The court holds that the registrar of the Southern Illinois Normal University, to whom was delivered a check for salary due appellee, acted as the agent of the treasurer of the University and not as the agent of appellee.

Mandamus, against the treasurer of a State institution to compel payment of salary. Appeal from the Circuit Court of Jackson County; the Hon. ALONZO K. VICKERS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

F. M. YOUNGBLOOD and W. A. SCHWARTZ, attorneys for appellant.

R. J. McELVAIN, attorney for appellee.

MR. PRESIDING JUSTICE SAMPLE DELIVERED THE OPINION OF THE COURT.

This was a proceeding by mandamus on behalf of J. M. Pierce, a teacher in the Southern Illinois Normal University, to compel J. M. Evans, the treasurer of said University, to pay his salary for the month of July, 1893. The petition set out that the petitioner was employed by the trustees of said University, at a yearly salary of \$1,200, payable in monthly installments of \$100 each; that a registrar was appointed by the trustees, whose duty it was to make out a pay roll for each month of all persons employed, which he did, showing that \$100 was due petitioner for the month of July; that a treasurer was also appointed by said trustees to have custody of the funds of said institution and to pay the same out to such persons appearing on said pay

roll, so prepared; that the treasurer had funds to pay said money to petitioner, but refused so to do.

The answer set up the defense, in effect, that the July salary was paid by check to the registrar, the agent of petitioner, who delayed presenting the same to the bank for about thirty days, at the expiration of which time said bank failed.

The issue of fact as to agency was submitted to a jury, which, after all the evidence was introduced, was directed by the court to find for the petitioner. The only question for determination is, was the registrar the agent of petitioner, or was there any substantial evidence tending to so show? After careful examination of the record, our conclusion is, the direction and judgment of the court below was right.

It would subserve no useful purpose to set up the evidence at length in the opinion. It will be sufficient to say that the treasurer's predecessor had, as he testified, for his convenience, made out and delivered the checks to the registrar, who was not to deliver them until those entitled had signed the pay roll, receipting for the same. This system was adopted by the present treasurer, as he testified. The faculty had nothing to do with the arrangement. The system was adopted for the convenience of the treasurer, and thereby the registrar was made his agent for the distribution of said checks. In this case the registrar could not deliver the check to petitioner because of the petitioner's absence. He could, in no event, under the plan adopted, with safety to himself, have delivered the check until the pay roll was receipted. This was the evidence required by the treasurer of the payment of the money, and served as a voucher, in his settlement with the State. The letter of petitioner to the registrar, of date August 1, 1893, inquiring if it would be convenient to pay the July salary then, was no evidence that he had constituted the registrar his agent to collect it. The letter was merely directed to him as the agent of the treasurer, from whom he had been receiving the checks for salary, when he signed the pay roll.

The judgment is affirmed.

Nathan Beyhmer v. Frances Odel.

1. **TIMBER—*Wrongful Cutting of.***—The court reviews the evidence and holds that it makes out a case under the statute prohibiting the cutting of timber without the permission of the owner of the land on which it is situated.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Perry County; the Hon. BENJAMIN R. BURROUGHS, Judge, presiding. Heard in this court at the February term, 1897. Affirmed. Opinion filed June 10, 1897.

R. W. S. WHEATLEY, BENJAMIN W. POPE and A. M. ELLIOTT, attorneys for appellant.

CREIGHTON, KRAMER & KRAMER, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee to recover from appellant the statutory penalty of \$8 per tree for cutting trees on her land against her consent. The verdict was for plaintiff, and \$40 was the amount assessed. Defendant's motion for a new trial was overruled and judgment was entered for plaintiff for \$40 and costs of suit. To reverse the judgment defendant took this appeal.

The case was twice before this court and it was held that the evidence did not show the plaintiff was owner in fee of the land on which the trees were cut, and the amount recovered was not a multiple of the sum of \$8 per tree, which was the only sum that was fixed by the statute as the measure of recovery for each tree so unlawfully cut. *Behymer v. Odel*, 31 Ill. App. 350.

In this record the evidence shows that appellee was the owner in fee of the land, when the trees were cut thereon by appellant; that at least five trees were so cut without permission of such owner, and the amount recovered was \$8 per tree. Secs. 1 and 2, Chap. 136, pages 3900, 3901

Starr & Curtis. This proof was sufficient to justify the recovery; but appellant insists that he was authorized to cut said trees by a contract between appellee and the firm of Beyhmer & Son, made on October 21, 1886, for the purchase of the whole oak timber on said land, by the terms whereof he was given eighteen months to remove said trees. The evidence, however, shows this contract was rescinded by mutual agreement, and afterward, about April 7, 1887, notice in writing to Behymer & Son was served, not to cut away any of the timber on said land. On April 9, 1887, appellant himself sent hands to cut the timber thereon, and they, by his order, cut the trees for which the recovery was had.

We find no reversible error in the rulings of the court as to instructions given and refused, and think the verdict and judgment is right. Judgment is affirmed.

Redden & Echols v. Lucy B. Slimpert.

1. **VERDICTS—Contrary to the Evidence.**—The evidence in this case shows that the lien of the mortgage sought to be foreclosed was discharged, hence the verdict was wrong, and the judgment rendered in pursuance of it must be reversed.

Replevin, to recover goods taken under a mortgage. Appeal from the Circuit Court of Pulaski County; the Hon. JOSEPH P. ROBARTS, Judge, presiding. Heard in this court at the February term, 1897. Reversed and remanded. Opinion filed June 10, 1897.

L. M. BRADLEY, attorney for appellants.

BOYD, WALL & BRISTOW, attorneys for appellee.

MR. JUSTICE GREEN DELIVERED THE OPINION OF THE COURT.

This suit in replevin was brought by appellee to recover certain personal property, and was tried under a stipulation "that any evidence that would be competent under any spe-

cial plea or replication may be offered under plea of general issue." The jury returned a verdict for the plaintiff, finding she was entitled to the possession of the property replevied. Appellant's motion for a new trial was overruled and judgment on the verdict and for costs was entered for plaintiff, to reverse which judgment appellants took this appeal. The plaintiff offered in evidence, and relied for recovery on, a chattel mortgage given by appellants, upon "the entire stock of goods and fixtures in store now occupied by firm of Redden & Echols," conditioned that the firm of Redden & Echols pay the note for \$682, payable to appellee or order, seven months after June 4, 1895, in installments of \$100 per month until paid. This note and \$300 in cash (\$982) were given to pay for a stock of goods and fixtures bought by appellants of one Will Slimpert, and upon a condition that any mistake in the invoice was to be corrected, if any was afterward found to have been made; the invoice was delivered to appellants by Slimpert, and footed up \$982.

The main defense, and the only one necessary to notice, is, that appellants had paid the whole amount really due on the note secured by said mortgage when appellee's agent demanded possession, by virtue of the mortgage, of the property therein described. The invoice was delivered to appellants and was not examined by them until just before the last payment of \$70 was made to appellee's agent and credited upon said note. He was then told that there was an error in the invoice, and an item of \$125.35 appearing therein was shown him, and, unlike every other item, there was nothing to show for what that sum was charged. The agent was asked to correct the invoice by striking out this erroneous charge, but declined to do so. The evidence clearly proved that appellants had received nothing, and that said charge was without any consideration, and, in fairness and honesty, should have been deducted from the sum of \$982, leaving the sum of \$856.65 as the real amount due for the stock and fixtures bought by appellants. Of this price, \$300 was paid in cash when the sale was made, and the note should have been given for \$556.65, instead of \$682,

for the balance due. Appellants paid in monthly installments the sum of \$578.73 before demand was made or the suit was commenced, which was more than the real debt the mortgage was given to secure, and thus discharged the lien thereof. There was a failure of consideration to the amount of the erroneous item, and under the stipulation this was a defense the appellants could interpose evidence to support.

Par. 13, Chap. 93, p. 2802, Starr & Curtis' Rev. Stat., provides: "If it shall appear consideration has failed in part, the plaintiff shall recover according to the equity of the case." But the right of a *bona fide* assignee before maturity of a negotiable instrument is not affected by this provision.

In this case, as before stated, appellee was the payee of the note secured, and relied upon the mortgage lien to establish her right to recover. The lien was discharged, as shown by the evidence, and the verdict was wrong.

The court erred in overruling appellant's motion for a new trial and entering judgment on the verdict. The judgment is reversed and the cause is remanded.

CASES

IN THE

APPELLATE COURTS OF ILLINOIS.

SECOND DISTRICT—MAY TERM, 1896.

**Elgin, Joliet & Eastern Railway Company v.
Fred C. Reese.**

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102
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1. **VERDICTS**—*On Conflicting Evidence.*—Where the evidence is conflicting it is the province of the jury to determine which is the better evidence and the more worthy of belief, and unless a court of appeal can see that their verdict is manifestly against the weight of the evidence, or the result of passion and prejudice, it should not be disturbed.

2. **EVIDENCE**—*As to Experiments and Witnesses' Knowledge.*—In an action against a railroad company to recover damages for the killing of stock at a highway crossing, it is proper to admit the evidence of witnesses as to experiments made by them to determine how far the train would be seen coming to the crossing from the highway, and to allow the witnesses to say whether they could have heard the whistle or bell if they had been sounded or rung.

3. **INSTRUCTIONS**—*Repetition of the Same Proposition.*—It is not error to refuse to give instructions which are substantially embodied in those already given.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Lake County; the Hon. CLARK W. UPTON, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896. Rehearing denied May 19, 1897.

WILLIAMS, HOLT & WHEELER, attorneys for appellant.

A. J. REDMOND, attorney for appellee.

Under conflicting testimony it is the province of the jury to find which is the better evidence and more worthy of belief, and such finding will not be disturbed by an appellate court except where it becomes necessary to do so to prevent palpable injustice where it is manifest the finding is the result of passion or prejudice. *Peoria, P. & J. Ry. Co. v. Siltman*, 88 Ill. 531; *Chicago, B. & Q. Ry. Co. v. Van Patten*, 64 Ill. 510; *Great W. Ry. Co. v. Geddis*, 33 Ill. 306.

Testimony as to experiments made by witnesses to determine how far the train could be seen coming upon the crossing, the character of the ground and obstructions of the view at the place in question being involved, is admissible. *Chicago & I. Ry. Co. v. Lane*, 130 Ill. 116; *Chicago & A. Ry. Co. v. Legg*, 32 Ill. App. 218; *Illinois C. Ry. Co. v. Burns*, 32 Ill. App. 196; *Chicago & A. Ry. Co. v. Dillon*, 24 Ill. App. 207; *Penn Co. v. Boylan*, 104 Ill. 595.

If all that is proper in an instruction is contained in another instruction, the court is not bound to give it a second time. *Chicago & A. Ry. Co. v. Kellam*, 92 Ill. 245; *Peoria P. & J. Ry. Co. v. Siltman*, 88 Ill. 529.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case to recover damages for the killing of eighteen head of cattle belonging to appellee by one of appellant's trains of cars, at the intersection of its railroad with a public highway known as Pomeroy's crossing, between the village of Barrington and Lake Zurich, in Lake county, in this State. There was a verdict and judgment for appellee for \$720.

The negligence charged in the declaration was a failure to give the statutory signals; running the train at a high and dangerous rate of speed and improper management of the train.

On the afternoon of July 16, 1895, Miss Reese, a sister of appellee, twenty years of age, was on the west side of appellant's railroad driving a herd of twenty-six cattle from the pasture, east along the public highway, toward the farm

house of her brother, which was some three-quarters of a mile east of the track. As the cattle were approaching the railroad from the west they were run into by an "extra" freight train belonging to appellants, and which was running at the rate of from twenty-five to thirty miles an hour, from north to south, down grade, and eighteen of the number were killed. It appears, from the evidence, that just before reaching the highway the railroad runs through a cut, and the ground, in the angle to the northwest of the crossing, between the railroad and the highway, is high and covered with trees, which, at the time of the accident, were covered with foliage, thus obstructing the view of one approaching from the west, and rendering the crossing dangerous. The girl in charge of the cattle testifies that she neither saw nor heard the train until it was close upon the cattle. There was no evidence tending to support the charge of negligence in managing the train, other than the supposed high rate of speed. There was the usual conflict in the testimony of witnesses as to whether or not the statutory signals were given, the trainmen and other employes of appellant swearing that the whistle was blown at about eighty rods north of the crossing, and the bell rung continuously from the time the whistle was blown until the cattle were struck, while on the other hand a number of witnesses, apparently having full opportunities for observing and knowing, testify directly to the contrary. Under this state of the evidence it was for the jury to determine where the truth lay, and we can not say their verdict was contrary to the evidence. Unless we can see that it is manifestly against the evidence, or the result of passion or prejudice, we ought not to disturb the verdict of the jury, whose peculiar province it is to determine which is the better evidence and the more worthy of belief.

Appellant insists that appellee's sister, in charge of the cattle, was guilty of such contributory negligence as to preclude a right of recovery. This was a question of fact for the jury, and they having determined that point against appellant we do not feel authorized, upon the evidence, to

disturb their finding. In fact, if her testimony is true, and it was for the jury to say whether it was or not, we do not see what she could have done more than she did do to avoid the injury. She was in the habit of driving these cattle across the track daily, for several years, and had no more reason to apprehend danger on the day of the accident than on any former occasion. She swears that she looked and listened for a train as soon as she got around the turn in the road, but discovered none approaching until it got within about ten rods of the crossing, and the cattle were then on the track. She must necessarily have been some little distance behind them, and we fail to see what more she could have done to prevent the collision. One who has ever tried it, knows what a difficult matter it is to keep a herd of twenty-six head of cattle at all times within entire control. To say that appellee should have had more persons in charge of the cattle, one in front of them and one behind them, we think would be requiring the exercise of more than ordinary care.

There was no error in admitting the evidence of witnesses as to experiments made by them to determine how far the train could be seen coming to the crossing from the highway, nor in answering the question as to whether they could have heard the whistle or bell if they had been sounded or rung. In this State such evidence has frequently been held competent. *C. & A. R. R. Co. v. Dillon*, 24 App. 207; *Penn. Co. v. Boylan*, 104 Ill. 595; *C. & A. R. R. Co. v. Legg*, 32 App. 218; *I. C. Ry. Co. v. Burns*, *Ib.* 196; *I. C. R. R. v. Swisher*, 53 App. 411.

We find no serious error in the action of the court upon the instructions. The refused instructions were substantially embodied in those already given, and it was unnecessary that they should be repeated. The judgment will be affirmed.

City of Keithsburg v. Charles J. Simpson.

1. **EASEMENTS—*In Favor of Municipal Corporations.***—The right to have water drained from its property through the natural channel exists in favor of a municipal corporation to the same extent as in favor of a private individual.

2. **MUNICIPAL CORPORATIONS—*Duty in Constructing Drains.***—A municipal corporation which has increased the flow of water in a certain direction is only bound to exercise reasonable care in providing means for carrying off the surplus water; it is not an insurer against unprecedented floods or cloud bursts.

3. **MEASURE OF DAMAGES—*Injury Caused by Water.***—A plaintiff suing for damage to his property caused by water is only entitled to recover such a sum as will put it in as good condition as it was before the flooding, together with compensation for any loss of use during the time it was rendered unfit for occupation.

Trespass on the Case, for damage caused by water. Appeal from the Circuit Court of Mercer County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the May term, 1896. Reversed and remanded. Opinion filed December 9, 1896. Rehearing denied May 19, 1897.

PEPPER & SCOTT, attorneys for appellant.

The law is that the owner of a higher tract of land has the right, "by ditches and drains, to drain his own land into the natural and usual channels which nature has provided, even if the quantity of water in that way thrown upon the next adjoining lower lands be thereby increased." *Peck v. Herrington*, 109 Ill. 611, 617; *Anderson v. Henderson*, 124 Ill. 164, 170; *Lambert v. Alcorn*, 144 Ill. 313, 326.

It has been held that this doctrine applies as well to highways as to private property. *Graham v. Keene*, 143 Ill. 425, 430; *Commissioners v. Whitsitt*, 15 App. 318. And while it has not been expressly decided in this State that it applies with equal force to streets and alleys, no reason appears why it should not do so, and it may be inferred that it does, from the cases of *City of Aurora v. Love*, 93 Ill. 521, and *Robb v. LaGrange*, 158 Ill. 21, 27.

BASSETT & BASSETT, attorneys for appellee.

We contend that when the municipal authorities construct gutters, ditches and sewers, and undertake to collect and conduct the water that accumulates in the streets and vicinity, they are bound to use reasonable care in constructing ditches, gutters or drains sufficient to control the water, and a failure to do so makes the city liable for damages to any one whose property is injured by such negligence, regardless of the question of dominant or servient estate.

We cite the following authorities to sustain this proposition and to controvert the contention of appellant. City of Aurora v. Reed, 57 Ill. 34; City of Aurora v. Gillett, 56 Ill. 135; City of Elgin v. Kimball, 90 Ill. 357; City of Alton v. Hope, 68 Ill. 169; City of Dixon v. Baker, 65 Ill. 518; City of Jacksonville v. Lambert, 62 Ill. 520; Nevins v. City of Peoria, 41 Ill. 502; City of N. Vernon v. Voegler, 103 Ind. 314; Weis v. City of Madison, 75 Ind. 241; Rice v. City of Evansville, 108 Ind. 7; City of Terre Haute v. Hudnot, 112 Ind. 542; Kranz v. City of Baltimore, 64 Maryland, 491; Hitchkins v. City of Frostburg, 68 Md. 100; Gilluly v. City of Madison, 63 Wis. 518; Dillon on Mun. Corp., 4th Edition, Sec. 1051, Vol. 2.

As to damages, the rule as given by the trial court, is laid down by Freeman on Judgments, Section 241; Illinois C. R. R. Co. v. Grabill, 50 Ill. 241; City of N. Vernon v. Voegler, 103 Ind. 314.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case, brought by appellee to recover damages caused to his property, as he claims, by reason of water flowing upon his premises in consequence of the failure of appellant to provide suitable ditches, sewers or drains, to carry off the water accumulating in the street, near the property in question. There was a trial by jury, verdict for \$108, and, a motion for new trial being overruled, there was judgment on the verdict for that amount. The evidence tends to show that the premises of

appellee were situated at about the point where the water accumulating in that vicinity found its natural outlet; but his contention is, that because appellant had, before the date of the alleged injury, constructed a ditch along the street in front of his premises, for the purpose of carrying off the water to another outlet, it was bound to so construct it as to render it sufficient for the purpose, and its failure so to do was such negligence as to render it liable for damages accruing in consequence of such failure.

It may be conceded that if the municipal authorities, by grading the streets and constructing ditches and drains, collect a larger body of water than would otherwise reach the natural outlet, and thus increase the flow to that point, they are bound to take care of it, and would be liable for any damage resulting from a failure to do so. But in this case the evidence leaves it a matter of doubt whether the city had increased the volume and flow of water to the vicinity of appellee's premises, which were its natural outlet, and if it had not done so, then the mere fact that it has constructed a ditch which would carry off most of the water, except in case of unusually heavy rains, would not render it liable.

The doctrine of dominant and serviant heritage applies as well between municipal corporations and private individuals as between private individuals alone.

It was for the jury to say, under proper instruction, whether the alleged damage was done in consequence of the city having wrongfully increased the flow of water to appellee's premises and negligently failed to provide for carrying it off; but the city had the right to have the doctrine of dominant and serviant heritage recognized, and not ignored, as was done in the seventh instruction given for appellee. By this instruction the jury were practically told that it was the duty of the city to provide means for carrying off the water flowing to appellee's premises, whether it had anything to do with bringing the water there or not, and wholly ignoring the proposition that water in its natural flow has a right to its natural outlet. We think the giving of this instruction was error.

In the same instruction the jury were told that "it is no excuse or defense for the city to show that the flooding of plaintiff's lot was occasioned by any unusually heavy rain." We think this portion of the instruction was improper to be given under the circumstances appearing in the evidence in this case. As we have seen, the evidence left it at least doubtful whether anything done by the city had increased the flow of water to plaintiff's premises. But, conceding that it had, then it was only bound to exercise reasonable care in providing means for carrying off the surplus water; it was not an insurer against loss or damage by water from unprecedented floods or cloud-bursts. The ditch in question had been in existence for twelve years, without complaint as to its sufficiency prior to the storm which caused the damage sued for. Some of the witnesses speak of this storm as a "flood," while others call it a "cloud-burst," and there can be no doubt it was an extraordinary fall of water. If the city provided ditches sufficient to carry off the surface water, which it could be reasonably apprehended would gather at the point in question, it filled the measure of its duty, and was guilty of no negligence in failing to anticipate "cloud-bursts" or extraordinary floods.

The seventh instruction asked by appellant contained a correct proposition of law, but as it ignored the claim insisted upon by appellee, that appellant had increased the flow of water to his premises, it was properly refused. The right which appellant had to have the water flow through its natural course over appellee's premises was, such water as would reach there in the natural order of things, and not an increased flow and volume by means of artificial ditches and drains.

We think the court erred in admitting evidence as to the decrease in the market value of the property by reason of the flood, for the purpose of fixing the damages, and also in giving the ninth instruction asked by appellee. There was no claim nor proof that the damage done was permanent and irreparable, and, if appellee was entitled to recover at all, it was only for such a sum as would put his property in

Sell v. Branen.

as good condition as it was before it was injured by the flooding, together with compensation for any loss of use during the time it was rendered unfit for occupation.

But by the ninth instruction the court told the jury: "The measure of damages is not what it would require to repair the property, but what it would be depreciated in the market by the flooding, and which the jury must find from the evidence in this case." We are of the opinion this instruction does not announce the true measure of damages in a case of this character, and was therefore erroneous.

For the errors indicated, the judgment must be reversed and the cause remanded.

Wm. F. Sell et al. v. James Branen.

1. **CONTRACTS—*In Restraint of Trade.***—It is well settled that an agreement not to transact business at a specific place or within a limited distance, if based upon a sufficient consideration, is valid.

2. **SAME—*In Restraint of Traffic in Intoxicating Liquors.***—Contracts held void, because of their being in restraint of trade, are so held upon the ground of public policy, and a contract restricting the retail traffic in intoxicating liquors in a town can not be considered against public policy, and is therefore valid.

3. **FORCIBLE DETAINER—*Possession Not Necessary.***—In this case, it was not necessary to the maintenance of an action of forcible detainer that appellee should have had possession of the rooms in controversy. See R. S., Chap. 57, Sec. 2, clause 2.

Forcible Detainer.—Appeal from the Circuit Court of De Kalb County; the Hon. CHARLES KELLUM, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896. Rehearing denied May 19, 1897.

THOS. M. & JAS. W. CLIFFE, attorneys for appellants.

W. C. KELLUM, attorney for appellee.

The contract between Phelps and Branen is not such a contract as is void by reason of being in restraint of trade.

Contracts entered into for a sufficient consideration, in partial restraint of trade, where the limitation is reasonable, will be upheld. *Cobbs v. Niblo*, 6 Brad. 60; *Stewart v. Ramsey*, 11 Brad. 379; *Brown v. Rounsavell*, 78 Ill. 589; *Linn v. Sigsbee*, 67 Ill. 75; *Diamond Match Co. v. Roeber*, 106 N. Y. 473.

It is sufficient for the maintenance of this action that Branen had the right of possession; it is not necessary that he should have ever been in possession in order to maintain forcible detainer. *Dunne v. Trustees of Schools*, 39 Ill. 578; *Cairo & St. L. R. R. Co. v. Wiggins Ferry Co.*, 82 Ill. 230.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On December 1, 1893, James M. Phelps while occupying a certain hotel building in Sycamore, Illinois, known as "Winn's Hotel," under a lease from testamentary trustee of Lewis Winn, deceased, entered into an agreement in writing with appellee whereby he leased to appellee two front rooms in the hotel, which had been used for a saloon until the 1st of November, 1895, for \$50 per month. In the writing it was provided that Phelps should retain and have the use of the rooms for any purpose excepting the retailing of intoxicating liquors. That he should not, for the entire term of the lease, enter into or be in any wise interested in the retail traffic of liquor within the city of Sycamore, and that for a violation of the agreement by Phelps he should be required to give immediate possession of premises to appellee. Appellee was at the time in the saloon business at Sycamore.

It is plain this agreement was entered into for the purpose of restraining competition. After appellee had paid rent under the agreement about a year Phelps turned over the lease which he held to the hotel to Wm. F. Sell and Samuel Emery, who opened a saloon in rooms adjoining and opening into the ones which appellee had leased from Phelps.

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Phelps did not use the two rooms for the sale of liquors but used them for a restaurant and lunch counter, which he conducted for Sell and Emery. Claiming that the agreement between him and Phelps had been violated, appellee demanded possession of the two rooms, which was refused. This suit for forcible detainer was commenced against Phelps, Sell and Emery, resulting in a judgment before a justice of the peace, and in the Circuit Court on appeal it was affirmed. The conduct of Phelps violated the spirit of his agreement if not the letter.

Its very purpose was to prevent the competition of a saloon in the Winn Hotel.

After reaping the fruits of his agreement for a year, and being allowed the exclusive use of the room leased, he arranged with third parties to open a saloon in the building and to use these rooms as a restaurant and lunch counter to be run in connection with it.

The contention that the contract is void because in restraint of trade can not prevail. In other kinds of business, and in those where the tendency is not immoral, it is well settled that an agreement not to transact business at a specific place or within a limited distance, if based upon a sufficient consideration, is valid. *Linn v. Sigsbee*, 67 Ill. 75; *Brown v. Rounsawell*, 78 Ill. 589. Contracts held void because of their being in restraint of trade are so held upon the ground of public policy.

It is difficult for us to see how a contract restricting the retail traffic of intoxicating liquors in a town can be considered against public policy. It was not necessary to maintain an action of forcible detainer that appellee should have possession of the rooms. Clause 2, Chapter 57, Hurd's Statutes.

The judgment was properly entered against Phelps and the other defendants, because they were in possession under Phelps. Judgment affirmed.

Peter Swanberg v. William E. Treadwell.

1. TRIALS BY THE COURT—*On Conflicting Evidence.*—A judge trying a case without a jury sees the witnesses when they testify, his opportunities for discovering the truth are superior to those possessed by a court of appeal, and as a rule his finding should not be disturbed.

Transcript, from a justice of the peace. Appeal from the County Court of De Kalb County; the Hon. CHARLES A. BISHOP, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896. Rehearing denied May 19, 1897.

W. C. KELLUM, attorney for appellant.

Where the trial is by the court, as in this case, the finding has the force of a verdict, and will be only set aside when a verdict would. Where the evidence is conflicting, as in this case, the finding will be sustained unless it is manifestly against the weight of the evidence, and certainly not where the evidence is conflicting and nearly balanced. The finding will not be set aside as unwarranted if the evidence of the prevailing party is by itself sufficient, if believed, to support it. This has been uniformly held to be the law by our Supreme and Appellate Courts in almost every volume of the reports. *Bush v. Kindred*, 20 Ill. 93; *Tolmas v. Race*, 36 Ill. 472; *Forloun v. Bowlin*, 29 Ill. App. 471; *Calvert v. Carpenter*, 96 Ill. 63; *Buchanan v. McLennon*, 105 Ill. 56.

H. T. SMITH and THOMAS CLIFFE, attorneys for appellee.

Where the evidence at first blush strikes the mind as clearly insufficient, or where the verdict is against the manifest weight of the evidence, a new trial should be granted. *Illinois C. R. R. v. Alexander*, 44 Ill. App. 505; *Belden v. Innis*, 84 Ill. 78; *Illinois C. R. R. v. Chambers*, 71 Ill. 519; *City of Chicago v. Lavelle*, 83 Ill. 482.

Where the parties waive a jury and the cause is tried by the court sitting as a jury, the court stands in the place of a jury, and the decision will be reversed or affirmed by the

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same rules which govern when the facts are tried by a jury. *Field v. C. & R. I. R. R. Co.*, 71 Ill. 458; *Thomas v. Rutledge*, 67 Ill. 213; *Crabtree v. Fuquay*, 49 Ill. 520; *McGregor v. McDevitt*, 64 Ill. 261.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellee to recover for medical services rendered appellant and members of his family.

Upon the trial he introduced a book account of original entries showing charges amounting to \$89.85, and cash credits to amount of \$50.

The case was tried by the court without a jury, and judgment for \$50 was rendered in favor of appellee.

Appellant claimed that nearly all of the services were rendered his adult daughter, who had been living away from his home, and was at the time earning her own living, and that the account was barred by the statute of limitations.

If the court believed appellee, then he was justified in finding that the services rendered appellant's adult daughter were rendered at the instance of appellant while the daughter was at his home, and under such circumstances as would make appellant liable, and that within five years prior to the commencement of the suit appellant promised to pay the balance of the account. So believing, the judgment was right.

Appellee was contradicted by appellant upon all the material points in issue, and upon some of them by appellant's daughter. But all the witnesses were seen by the court when they testified. His opportunities for discovering the truth were superior to ours.

The case does not justify a review in detail of the conflicting points of contention in the evidence.

Judgment affirmed.

Kingman & Co. v. Meyer Bros.

1. **ESTOPPEL—Execution of Notes.**—The signing of notes for the purchase price of machinery, under a promise to put the machinery in repair, does not estop the payer of the notes from denying the acceptance of the machinery.

2. **SALES—Breach of Warranty—Recovery of Money Paid.**—Where machinery is purchased on a written order, like the one in evidence in this case, but fails to meet the requirements of the order, and the purchaser gives notice of such failure, as required by the terms of the order, if the seller fails to remedy the defects, and the machinery is not afterward accepted by the purchaser, and the warranty thereby waived, he may recover money which he is forced to pay on notes given for the amount of the purchase price of the machinery.

3. **CONTRACTS—A Contract Construed.**—The contract in evidence in this case did not make it the duty of the appellees to return the machinery ordered in case they did not accept it, but only made them liable for the return freight.

Assumpsit, for breach of a warranty. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896. Rehearing denied June 25, 1897.

ARTHUR KEITHLEY, attorney for appellants.

LOUIS F. MEEK, attorney for appellees.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit commenced in the Circuit Court of Peoria County, by appellees Meyer Bros., a firm, consisting of C. J. and C. E. Meyer, against the appellant, a corporation, to recover money paid by them to the appellant on account of a self-steering traction engine, second-hand, purchased or attempted to be purchased by appellees, and notes given on account thereof to appellant and afterward paid by them on a judgment obtained thereon by confession.

It appears from the evidence that the appellant was a resident of the city of Peoria, Illinois, and the appellees residents of Crescent City, Illinois; that the appellees on Janu-

ary 4, 1892, gave an order to the appellant to furnish or ship at once, in care of Meyer Bros., to Crescent City, Illinois, No. 11 of second-hand list, Case Ten Horse-Power Self-Steering Traction Engine, with tools and fixtures, on which order they agreed to receive the engine subject to the conditions attached to the order, and pay the freight and charges thereon from the factory and to appellant's order, on delivery, \$400 in notes, \$200 due October 1, 1892, and \$200 due October 1, 1893.

By section four of the conditions the articles were "warranted to be of good material, well made and with proper management capable of doing as good work as similar articles of other manufacturers; * * * continued possession or use of the machinery after the expiration of time named above shall be conclusive evidence that the warranty is fulfilled to the satisfaction of the undersigned, who agree thereafter to make no further claim upon the warranty."

The fifth section provides, "It is also agreed and distinctly understood, that in case we for any reason do not take said machinery we will pay you as damages an amount equal to the freight from factory to the place of delivery and back to factory, cancellation of order being wholly optional with you."

The cause was tried before a jury and resulted in a verdict for appellees for \$442, and judgment thereon was rendered against appellant.

The evidence shows that the machine was shipped to Crescent City as ordered and there unloaded and taken to the place of business of the appellees. After it arrived they unloaded it, put water in it, fired it up and tried to run it, but soon found it needed more water. They found that the injector would not work, and after experimenting with it with a practical engineer and others they failed to put water into it through the natural channel. They then wrote to Kingman & Co. with reference to it. They also found the levers out of order. The flues, instead of being replaced by new, were old and leaky, and the fire-boxes were badly burned out, and the lubricator, instead of forcing the oil

down into the cylinder, it would go up the other way, and the cylinder leaked steam, so that if you wanted to start it you had to throw the throttle valve wide open and the engine would hardly pull itself, and the pumps and injector would not work at all, and as C. J. Meyer, one of appellees, testified, were not made to work by anybody that has touched it since that day.

A short time afterwards, one Isch, traveling salesman for appellant, arrived at appellees' place of business. They claimed that neither the pumps nor injector worked. He went there to settle for it. They refused to settle for the engine, claiming that it was defective, and Isch reported to appellant and shortly after they sent a man by the name of Cramer over to fix it, who, as the evidence tended to show, failed in doing so and made it worse than it was before, and broke the reverse link and left the machine where it was.

In October, 1893, a Mr. Reed on behalf of appellant, went to Crescent City to take the notes for the machine, when the appellees made the same complaints to him about the engine as they had to Isch and Cramer. The engine had never been able to pull a load, or operate any more than itself, and had never been moved. Reed said that he would see that the matter was straightened up, and upon that promise the notes were signed, and they proved to be judgment notes, and afterward a judgment was rendered on them, execution issued and appellees were forced to pay them.

Appellant never sent any one after this to put the engine in repair, and the engine remains in the same place where Cramer left it.

The evidence tended to show that the machine was worn out and worthless.

The case was tried upon the theory that the machine had never been received by appellees, that the signing of the notes executed under promise of putting the machine in repair did not estop appellees from denying the acceptance of the engine, and that if the engine did not meet the requirements of the order given for it, and the appellees

performed their duty under the order by giving the notice required by the terms thereof, and the defects were not remedied by the appellant, and without fault of appellees the engine failed to do the work required of it, and appellees had not afterward accepted the engine and thereby waived the condition of warranty in the order given, then they had a right to recover for the money paid on the executions.

Appellee's instructions were given on this basis.

We are of the opinion that the verdict was supported by the evidence on the issue of fact there presented.

Counsel for appellant claim that according to the terms of the contract continued possession of the machine by appellees was a conclusive waiver of the warranty, and also the use of it was the same, but we think the evidence justified the jury in its verdict under the instructions of the court that the machine was never held in the possession and absolutely accepted by appellees, but that they only held it to be experimented upon by appellant, conditioned upon its being put in order according to the warranty, nor would they be estopped even if they allowed others to experiment on it and use it if they could. They might have been willing if any body could work it to finally accept it, but as the appellant never fixed it and as neither appellees nor any one else could ever use it, under the evidence in the case, we think the jury was justified in its verdict. We do not think that it was the duty of the appellees to return the machine to Peoria if they never accepted it.

By the fifth clause of the contract it was provided, as will be seen in the copy which we have given of it above, that in case the appellees did not take the machine they were to pay as damages an amount equal to the freight from the factory to the place of delivery and back to the factory, and the most that could be said is that the appellant might recoup those expenses; but the appellees paid the freight from Peoria to Crescent City, and there was no proof of what the freight would be back and no attempt to prove it.

We are of the opinion that the verdict is not too much; in fact, it might have been greater if interest had been allowed on the amount of the judgments paid.

The objection made to the refusal of the court to give the first, third, fourth and fifth refused instructions of the appellant was not error.

The first was given in the second given instruction for appellant. The third was erroneous in requiring actual notice to be given appellant other than that received by its agents in the transaction of its business.

The fourth refused instruction is covered by the third and fourth instructions given for appellant and the matter attempted to be covered by the fifth refused instruction was not properly before the jury. The evidence was such that no such point could be made.

Seeing no error in the record, the judgment of the court below is affirmed.

T. F. McCarthy v. Otto A. Hetzner.

1. **AMENDMENTS**—*May be Made at any Time after Papers are Filed.*—A court has full jurisdiction and control over papers from the time they are filed, and can allow amendments at any time upon the application of the plaintiff.

2. **APPELLATE COURT PRACTICE**—*As to Matters Not Abstracted.*—Under its rules this court is not compelled to search the record for information in regard to a controverted point. Whatever an appellant desires to have the court pass upon should be fully abstracted, and in the absence of an abstract upon any point it will be presumed that the court below held properly.

3. **PRACTICE**—*Objections Should be Specific.*—A general objection to a chattel mortgage as evidence will not reach an objection that presumably might have been obviated if specifically pointed out. And this rule will apply to an objection that there was no proof that the justice taking the acknowledgment was a resident in the precinct where the property was situated.

4. **SUIT**—*When Considered as Commenced as to New Defendants Added by Amendment.*—If a new party be made defendant, under the practice act he must necessarily be brought in by summons, and that amounts to the commencement of a new suit, so far as he is concerned.

5. **MORTGAGES**—*Rights of Mortgagee Under Insecurity Clause.*—Under an insecurity clause of a chattel mortgage, a mortgagee is justified in feeling insecure when the property is taken on a distress warrant,

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and has a right to immediate possession, otherwise the property might be sold and dissipated and the security lost.

Replevin.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the May term, 1896. Affirmed. Opinion filed December 9, 1896. Rehearing denied June 25, 1897.

BUTTERS, CARR & GLEIM, attorneys for appellant.

A mortgagee can not recover mortgaged property levied upon by a third party until condition broken, unless there is an insecurity clause in his mortgage. There being none of the covenants of the mortgage in question violated by the mortgagor, the right of the mortgagee to maintain this suit is given him only under the insecurity clause in this mortgage, and to recover a verdict in his favor, he must show that he had reason to, and did, feel himself unsafe or insecure, and that he had made demand on the person holding the property before he instituted this suit. *Furlong v. Cox*, 77 Ill. 293; *Roy v. Goings*, 96 Ill. 361.

The interest of a mortgagor in mortgaged property is always subject to execution and sale, provided there be no insecurity clause in the mortgage, and although there be an insecurity clause in the mortgage, where mortgaged property is levied upon, the mortgagee is not required to foreclose his mortgage; such levy, of itself, does not at once mature the note or mortgage, but only gives a right to the mortgagee to declare them due. "Until that affirmative act is done the rights, duties and obligations of all parties remain precisely the same as if the mortgage contained no such provision." *Beach v. Derby*, 19 Ill. 622; *Wilson v. Rountree*, 72 Ill. 570.

The acknowledgement does not show, nor was proof offered to show, that the justice who took the acknowledgement of the mortgage in question was a resident of, or held his office in, the township of Ottawa, and we submit, that under the rule of construction applicable in this case, no presumption arises that will supply the want of such proof, to meet the requirements of the statute. *Beach v. Darby*, 19 Ill. 622.

HALL & HAIGHT, attorneys for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action in replevin, by appellee against appellant, commenced January 7, 1895, in the first instance against Mary Mannix, and afterward, by leave of court, the papers were amended so as to add appellant, a constable, who held the property in question under a distress warrant issued by Mary Mannix against Thomas W. Dwyer, her tenant, and on the 15th day of January, 1895, by leave of court, the papers and summons were amended so as to include appellant as defendant.

This is assigned for error, but we think the court had the power to allow the amendment under the statute and under the general powers of the court.

It could be done before the defendants were served, and prior to the time the court acquired jurisdiction of the person of the defendant as well as afterward, and before the time arrived at which the summons was made returnable or the time when the cause stood for trial.

The court had full jurisdiction and control over the papers from the time they were filed in court, and could allow amendments at any time upon the application of the plaintiff.

The appellee claimed the property under a chattel mortgage from the same Thomas W. Dwyer, duly acknowledged and recorded, made long prior to the issuing of the distress warrant.

One of the main points of appellant's contention is that the mortgage failed to describe the property sufficiently so that it might be identified by the public and the creditors of Dwyer. We think the point is not well taken.

From what is stated on the argument on each side we are inclined to think that it would be held that the property was sufficiently described, but the appellant has failed to abstract the description in the mortgage, and we are not compelled by the rules of this court to search the record to see what the description is.

If appellant had desired to have this court pass upon its sufficiency he should have abstracted it. It will be presumed by us, in the absence of any abstract, that the court below held properly in regard to the sufficiency in the description.

It is also insisted that there was no proof that the justice of the peace taking the acknowledgement of the grantor in the mortgage was a resident in the Ottawa precinct, where the property was situated, but when the mortgage was offered in evidence there were other objections made to its introduction, but not this one, and now in this court this objection is made for the first time.

We think it comes too late. If the justice of the peace had not really resided in the precinct where the property was situate, the objection should have been made in the court below, and thus ended the litigation; and if the justice had so resided, fairness and good faith would have required the objection to have been made there, thus enabling the appellee to have made the proof if he could.

Objection was made to the introduction of the mortgage in evidence, but it was only a general objection, without specifying the objection now urged.

We think the objection now comes too late. Weber, for use, etc., v. Mick et al., 131 Ill. 520.

In that case it was held that general objection to an introduction of a mortgage did not put the party offering it upon the proof of the official character of the justice of the peace taking the acknowledgement of it, where, under the facts of the case, he would have been required to make the proof if such specific objection had been made.

We see no reason why so just a rule should not apply in this case. The objection in this case and in that go to the authority of the person taking the acknowledgement, and therefore we think the same rule should apply.

Another point of objection made by appellant is that there was no proof of demand, but we think the proof was sufficient to show that the demand was made before the suit was commenced, and beyond any doubt before the summons was served on the appellant and the property taken.

The appellant was not served with summons prior to January 15, 1895, and that is the day on which he was made a party. He was made defendant on that day, and demand was made on him for the property before he was made a party by being summoned.

He refused to give it up, and, therefore, the demand was made before the commencement of the suit as to him.

"If a new party be made defendant, under the practice act he would necessarily have to be brought in by summons, and that would be the commencement of a new suit, so far as he is concerned." *U. S. Insurance Co. v. Ludwig*, 108 Ill. 514; *Lusk v. Thatcher*, 102 Ill. 60; *Wells on Replevin*, 372, page 210.

We have no doubt, under the insecurity clause of the mortgage, appellee was justified in feeling himself insecure when the property was taken on distress warrant, and that he had a right to immediate possession, otherwise the property was in danger of being sold and dissipated and the mortgage security thereby lost.

The instructions of the court, given orally by agreement, we think were correct.

There are a few more technical objections, none of which we deem worthy of notice.

The judgment of the court below is therefore affirmed.

John M. Peterson v. George E. Randall.

1. INSTRUCTIONS—*Error Without Injury.*—A court of appeal will not interfere with a judgment on account of the giving of an erroneous instruction, where it is clear that the instruction could not have misled the jury.

2. COSTS—*Where a Judgment is Corrected in a Mere Matter of Form.*—Where a judgment is corrected on appeal as to a matter that could have been corrected at any time in the trial court on motion, and that can be corrected in this court on motion, without reversal, the court will exercise its discretion in its award of costs.

Replevin.—Error to the Circuit Court of Knox County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the December

term, 1896. Affirmed in part and corrected. Opinion filed December 17, 1896. Rehearing denied June 25, 1897.

J. A. McKENZIE, attorney for plaintiff in error.

DOUGHERTY & BOUTELLE, attorneys for defendant in error.

OPINION PER CURIAM.

The plaintiff in error Peterson replevied from the possession of the defendant in error Randall a Jersey heifer and a stove and pipe, before the justice of the peace, and on appeal to the Circuit Court the defendant in error succeeded in obtaining a verdict from a jury impaneled to try the issue, which found the issue in favor of plaintiff in error as to the calf. By agreement in open court, prior to the trial, the stove and pipe were admitted to be the property of the plaintiff in error, and the defendant in error disclaimed any ownership therein.

The parties to the suit had exchanged real estate in Galesburg, belonging to defendant in error, for a farm in the country belonging to plaintiff in error, and as part consideration for the city property plaintiff in error agreed to let defendant in error have ten calves—or as plaintiff in error claims, nine—of which defendant in error contended the Jersey heifer in dispute was one, and plaintiff in error that it was not included. Upon this issue the jury found in favor of the former, and we think such verdict was clearly supported by the evidence.

But the court inadvertently rendered judgment on the verdict broader than the verdict, and pronounced the title in the property replevied to be in defendant in error, and awarded a writ of *retorno habendo* for the same, when it should have only rendered judgment for and ordered a return of the calf in accordance with the verdict.

The plaintiff in error insists that the court erred in giving the following instruction No. 4, for defendant in error, viz.:

“4. The jury are instructed that if you believe from the evidence that the calf in controversy was included in the bill

of sale from Peterson to Mrs. Annie Randall, and that the said bill of sale was delivered to her, and the said calf in controversy was delivered to her on the farm which she had purchased, and was in her possession at the commencement of this suit, then and in that case, your verdict will be for the defendant."

Although the witnesses referred to a bill of sale on the trial, and it was shown, at least, to one witness, it was not formally introduced in evidence, therefore it is insisted that the instruction was erroneous in referring to it.

We do not think that any serious error was committed in this.

The verbal testimony showed the calf was included in the bill of sale—nominally ten calves—and no objection was made to this evidence; besides the entire evidence over the issue was whether the heifer in question was intended to be included in the sale of the calves named in general "nine or ten calves."

The jury could not have been misled whether the sale be regarded as verbal or in writing.

The judgment finding the property of the calf in defendant in error, and in ordering a return thereof to defendant in error, will be sustained and affirmed, and reversed as to the stove and pipe, and the judgment is ordered rendered in this court as follows, after reciting the verdict, viz. :

"The court therefore finds the title to the property in the calf in controversy in the defendant, and that plaintiff pay defendant the sum of one cent damages for the retention thereof, and defendant have a writ of *retorno habendo* for the said calf, and that defendant recover his reasonable costs in this behalf expended, and that he have execution for the damages and costs. The error in the court below was one that could have been corrected at any time in that court on motion, and can be corrected here without reversal. This court will exercise its discretion in a case like this in its award of costs. *Moore v. People*, 108 Ill. 484.

The judgment of the Circuit Court is therefore affirmed as to the judgment awarding the calf in question to de-

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findant in error, and judgment amended here as above indicated, and judgment rendered against appellant for costs of this court. Judgment in part affirmed and corrected.

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89 244

**Chicago, R. I. & P. Ry. Co. v. Josephine Ohlsson, by her
Next Friend.**

1. *ORDINARY CARE—Application of the Rule to Children.*—A child is only required to exercise that degree of care and caution which children of like age, capacity and experience may reasonably be expected to use under like circumstances.

2. *SAME—Of Children—A Question for the Jury.*—An instruction telling a jury that the law does not require of an infant six years of age, or any other age, the same degree of care and caution that it does of an adult, but only requires such care and caution as is ordinarily exercised by one of her age, is erroneous, because, whether a child is of sufficient age to exercise proper care for its safety under the circumstances is always a question of fact for the jury. Such an instruction however is not ground for reversal where the age of the infant was such that no harm could have been done by it.

3. *RAILROADS—Running Trains at Great Speed as Negligence.*—Considering the great amount of travel over the crossing where the injury sued on was inflicted, the density of the population at that point, and the rather meager provision which had been made by the railroad company for warning the public of approaching trains, the court concludes that there was negligence in running the train, which struck appellee, at the rate of more than twenty miles an hour.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. GEORGE W. STIPP, Judge, presiding. Heard in this court at the December term, 1896. Affirmed in part. Opinion filed June 26, 1897.

HILL, HAVEN & HILL and W. T. RANKIN, attorneys for appellant; ROBERT MATHER, of counsel.

JOHN W. D'ARCY, attorney for appellee.

It has been held that children of eighteen months, of two years and ten months, of four years, under five years, of

five years, of six years, under seven years, and even seven years of age, are incapable of contributory negligence. Bishop's Non-Contract Law, Sec. 586, and authorities cited. This rule seems to have been recognized in this State with more or less distinctness in the following cases: Chicago & A. R. R. Co. v. Becker, 84 Ill. 483; Chicago & A. R. R. Co. v. Gregory, 58 Id. 226; City of Chicago v. Hesing, 83 Id. 204; Gavin v. City of Chicago, 97 Id. 66; Toledo, W. & W. Ry. Co. v. Grable, 88 Id. 441; Chicago, W. D. Ry. Co. v. Ryan, 131 Id. 474; Chicago, St. L. & P. R. R. Co. v. Welsh, 118 Id. 572.

On the question of negligently running a train at a high rate of speed over a dangerous crossing, we refer to the case of Chicago & A. R. Co. v. Adler, 28 App. 107; see also Central Ry. Co. v. Allmon, 147 Ill. 471; East St. Louis C. Ry. Co. v. O'Hara, 150 Ill. 580; Partlow v. I. C. R. Co., 150 Ill. 321; Lake Shore & M. S. R. v. Ouska, 151 Ill. 232; Louisville & St. L. C. R. R. Co. v. Gobin, 52 App. 565; Illinois C. R. Co. v. Murphy, 52 App. 65.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee, by next friend, to recover for injuries sustained by her while attempting to cross appellant's railroad track in front of a moving train. There was a trial by a jury which resulted in a verdict and judgment in favor of appellee for \$3,000.

At the time she received the injuries complained of appellee was a child six years of age, residing with her grandparents, in the city of Joliet, a short distance from the place where appellant's railroad crosses Collins street, the point where the accident occurred. She and several other children had been playing about a small flat car, which stood upon the side track in the street, when a milk train approached from the east. When the train was about fifty feet from the crossing, she attempted to cross the main track, and in doing so was struck by the train. The evidence shows that the Collins street crossing is in a thickly populated

portion of the city. At the time of the injury, no gates had been established there, but the railroad company had a flagmen stationed there. The train was running at a rapid rate of speed, considering the thickly populated district it was running through. The flagman was at his post and had signaled to persons who were wanting to cross. Appellee was evidently trying to reach another girl who was standing upon the sidewalk on the opposite side of the track.

In view of the tender years of appellee we do not think there was such want of ordinary care on her part as would preclude a recovery if appellant was guilty of negligence which caused the injury. She was only required to exercise that degree of care and caution which children of like age, capacity and experience may reasonably be expected to use under like circumstances. Such a rule is distinctly recognized by the courts of this State. *Kerr v. Forgue*, 54 Ill. 482; *Chicago & A. R. R. Co. v. Gregory*, 58 Ill. 226; *Chicago & A. R. R. Co. v. Becker*, 76 Ill. 25; *Chicago, St. L. & P. R. R. Co. v. Welsh*, 118 Ill. 572; *Chicago, C. Ry. Co. v. Wilcox*, 138 Ill. 370. The conduct of appellee on the occasion of the accident was quite natural for a child of six years.

When we consider the great amount of travel over the Collins street crossing, and the density of the population at that part of the city, and the rather meager provision which had been made by the railroad company for warning the public of approaching trains, we are forced to the conclusion that there was negligence in running the milk train, which struck appellee, at the rate of speed it was running at the time—more than twenty miles per hour.

Upon the part of appellee, the court gave the following instruction:

9. The court instructs the jury that the law does not require of an infant six years of age the same degree of care and caution that it does of an adult, but it only requires such care and caution as is ordinarily exercised by one of her age, capacity and experience.

The instruction is erroneous because it invades the province of the jury. It is not proper for the court to tell the jury that the law does not require of an infant six years of age, or any other age, the same decree of care and caution that it does of an adult. It is always a question of fact to be determined by the jury whether a child is of sufficient age to exercise proper care for its safety under the circumstances. We do not feel warranted in reversing the judgment because of this instruction, however. The age of appellee was so tender that no serious harm was done appellant by the giving of it.

We see nothing wrong with instructions eight and eleven, given for appellee. No error was committed in refusing instructions offered by appellant. In the tenth, given for appellee, the jury were told that in the event of finding for her they would have the right, in assessing damages, to take into consideration the expense incurred by her in endeavoring to be cured.

There was no evidence that she paid or incurred any expense in endeavoring to be cured. It was improper, therefore, to give such an instruction, but the remittitur entered in this court cures that error.

When the case was first considered by us, we were of the opinion that while there was a right of recovery upon the facts, the damages allowed by the jury were excessive. Our view in regard to the damages was intimated to counsel, whereupon, appellee entered a remittitur of \$1,200. We now think the judgment should be affirmed as to \$1,800. The clerk of this court will enter judgment in favor of appellee for \$1,800 and against her for costs. Affirmed in part.

**Walter H. Smith v. J. H. Bell, Adm'r, etc., and the
County of Livingston.**

1. DECREE—*Form of, When Bill is Without Equity.*—The language of the decree in this case, that the court doth "find that there are no equities in the said petition, and that the said demurrer should be sus-

tained and said petition dismissed for want of equity," is that usually employed where a demurrer is sustained to a bill or petition which presents no equitable ground for relief, and is not subject to objection on the ground that it is conclusive of all equitable rights between the parties growing out of the same contract.

2. **MECHANICS' LIENS**—*Form of Petition Under Sec. 24 of the Act of 1895.*—It is not necessary that a petition claiming a mechanic's lien under Sec. 24 of the Mechanic's Lien Act of 1895, should set out in detail the contract between the municipality and the original contractor; an allegation of the existence of the contract is sufficient.

3. **SAME**—*When Lien is Claimed Under Sec. 24, Notice Need Not be Filed with the Circuit Clerk.*—It is not necessary to the validity of a mechanic's lien, under Sec. 24 of the Mechanic's Lien Act of 1895, that a notice of lien be filed in the office of the clerk of the Circuit Court, as required by Sec. 39 of the act. That requirement applies only where a lien is sought against real estate, and has no reference to Sec. 24.

4. **SAME**—*The Law is Remedial and Subject to Legislative Control as to Past Contracts.*—Remedies which the law affords to enforce contracts constitute no part of the contracts themselves, and are subject to such changes as the legislature may prescribe. And a lien given by statute to mechanics and material men is but a cumulative remedy to enforce their contracts, and is as much within legislative control as any other remedy afforded by law.

5. **CONSTRUCTION**—*Of Act, by Legislature, is Binding on the Courts.*—Where the law-making power places a construction upon an act, the courts must adopt such construction unless it contravenes the Constitution or some settled rule of public policy.

Mechanic's Lien.—Appeal from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded, with directions. Opinion filed June 26, 1897.

TORRANCE & TORRANCE, attorneys for appellant.

It is always permissible for the legislature to change the law of remedy, and where a new remedy is given, it is enforceable from the taking effect of the law. Further, where the legislature declares the law to be a remedial one, the courts must give it such a construction. This was done by the statute under review. See act to revise the law in relation to mechanics' liens, Laws 1895.

Remedial statutes are always so constructed as to advance the remedy. *McNulta v. Lockridge*, 137 Ill. 270.

And they should be liberally construed in order to avoid

the evils to be remedied. *Conkling v. Ridgely*, 112 Ill. 36; *People v. Wabash R. R.* 104 Ill. 476; *Ball v. Chadwick*, 46 Ill. 28; *Bowles v. Keator et al.*, 47 Ill. App. 98.

It is evident the object of the legislature, by section 24 of this act, was to provide a remedy that would enable sub-contractors to enforce payment by the original contractor for the amount due them by giving a lien on whatever money, warrants or bonds public corporations might have in their control due to the original contractor. It created no liability against such corporations or officers, but simply required them to deliver money, bonds and warrants to the sub-contractor, if any held by them and due the original contractor from them under his contract. This being the object of the statute, courts should adopt such a liberal construction as will advance the remedy, not cripple it. *Jackson v. Warren*, 32 Ill. 331; *R. R. I. & St. L. R. v. Heflin*, 65 Ill. 366.

And the remedy should not be restricted by construction. *Honore v. Wilshire*, 109 Ill. 103.

STEPHEN R. MOORE, attorney for appellee J. H. Bell, administrator.

C. C. STRAWN, attorney for appellee Livingston County.

The general rule is, that no statute, however positive in its terms, is to be construed as designed to interfere with existing contracts rights of action or suits—and especially vested rights—unless the intention that it shall so operate is expressly declared, and courts will apply new statutes only to future cases, unless there is something in the very nature of the case, or in the language of the new provision, which shows that they were intended to have a retroactive operation. And although the words of the statute are broad enough in their literal extent to comprehend existing cases, they must yet be construed as applicable only to cases that may thereafter arise, unless a contrary intention is unequivocally expressed therein. *Wood v. Oakley*, 11 Paige, 403; *Butler v. Palmer*, 1 Hill, 325; *Johnson v. Burrell*, 2 Hill, 238; *Dash v. VanKleeck*, 7 John. 499; *Berley v.*

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Rampacher, 5 Duer, 183; Calkins v. Calkins, 3 Barb. 306; Sackett v. Andross, 5 Hill, 334; Vedder v. Alkenbrack, 6 Barb. 328; People v. Supervisors, etc., 10 Wend. 362; Van Rensselaer v. Livingston, 12 Id. 490; Warren M. Co. v. Ætna Ins. Co., 2 Paine's C. C. R. 517.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellant filed a petition in the Circuit Court showing that on the 28th of July, 1894, he entered into a written contract with one William H. Hamilton, who had contracted with the county of Livingston for the erection of a county poor house; that the contract price with Hamilton for material, labor, etc., was \$11,500, to be paid on the completion of the contract; that he had complied with the contract, and in addition thereto, at the request of Hamilton, had furnished other material and labor to amount of \$2,753.59; that Hamilton had paid him only \$9,573.28; that the county of Livingston had money and warrants due Hamilton on his contract, yet undelivered, and that he had served a written notice of his claim of a lien thereon on the county officials having in charge the construction of the building. The petition prayed for an accounting between Hamilton and appellant, and that a lien be declared upon the money, bonds and warrants due Hamilton from the county for the satisfaction of his claims.

After the commencement of the suit Hamilton died, and J. H. Bell, administrator of his estate, was substituted as defendant.

The court sustained a demurrer to the petition and dismissed it for want of equity. From that decree appellant prosecutes this appeal.

We see no force in the contention that the decree is erroneous, because it is conclusive of all equitable rights between appellant and appellee growing out of the contract, when it should have found merely that the petition was defective. The language of the order, "the court" doth "find that there are no equities in the said petition, and

that the said demurrer should be sustained and said petition dismissed for want of equity," is that usually employed where a demurrer is sustained to a bill or petition which presents no equitable ground for relief. There is no valid objection to the form of the decree.

The claim of a right of lien on the money, bonds and warrants in possession of the county, due on the original contract between Hamilton and the county, is based upon section 24 of an act of 1895 to revise the law in relation to mechanics' liens, which reads as follows:

"Any person who shall furnish material, apparatus, fixtures, machinery or labor to any contractor for a public improvement in this State, shall have a lien on the money, bonds or warrants due or to become due such contractor for such improvement; provided such persons shall, before any payment or delivery thereof is made to such contractor, notify the officials of this State, county or township, city or municipality, whose duty it is to pay such contractor, of his claim, by a written notice, and the full particulars thereof. It shall be the duty of officials so notified, to withhold a sufficient amount to pay such claim until it is admitted or by law established, and thereupon to pay the amount thereof to such person, and such payment shall be a credit in the contract to be paid to such contractor. Any officer violating the duty hereby imposed upon him shall be liable on his official bond to the person serving such notice for the damages resulting from such violation, which may be recovered in an action at law in any court of competent jurisdiction. There shall be no preference between the persons serving such notice, but all shall be paid *pro rata* in proportion to the amount due under their respective contracts."

It is contended in behalf of appellees that the petition should set out in detail the contract between the county of Livingston and Hamilton. That contention seems to be raised for the first time in this court, as it is not included in either one of the twenty-six causes for demurrer assigned in the Circuit Court, and that of itself is a sufficient reason

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why it should not prevail here. We are of the opinion, however, that the setting out of such contract in detail was not necessary. The petition shows that at the time appellant entered into the contract with Hamilton, July 23, 1894, Hamilton had a contract with the county for the construction of the building. That was sufficient.

It was not necessary for the petition to show that a notice of lien had been filed in the office of the clerk of the Circuit Court, as required in Section 39 of the act. That requirement applies only when a lien is sought against real estate, and has no reference to Section 24, which is entirely new, and gives a lien to sub-contractors upon money, bonds and warrants due from a county, township or municipality to an original contractor for public improvements.

The most serious question in the controversy is raised by the contention that the petitioner is not entitled to the lien sought because the act giving it was not passed until 1895, while the contract between him and Hamilton was entered into nearly a year earlier. It is insisted that if the act be applied to this case then it affects the obligations of a prior contract. We do not entertain that view. An application of the act does not increase, diminish or affect the liability of any of the parties to the original contract, or the sub-contract between Hamilton and the petitioner. The act simply provides a remedy for sub-contractors upon public buildings which did not before exist.

Remedies which the statute furnishes to enforce contracts constitute no part of the contract. Remedies for enforcing contracts are within the control of the legislature, and where an act merely furnishes an additional one it can in no just sense be regarded as impairing the obligations of contracts. A lien given by statute to mechanics and material men is but a cumulative remedy to enforce their contracts, and is as much within legislative control as any other remedy afforded by law. *Smith v. Bryan*, 34 Ill. 364; *Templeton v. Horne*, 82 Ill. 491.

Again, the legislature, by the forty-first section of the act, declared that it is remedial, and should be construed as such.

Where the law-making power places a construction upon an act the courts must adopt it, unless such construction contravenes the Constitution or some settled rule of public policy.

The court erred in sustaining a demurrer to the petition and dismissing it for want of equity.

The decree will be reversed, with directions to the Circuit Court to overrule the demurrer.

George Burke v. C. Hindman.

1. TRIALS BY THE COURT—*Finding Not Disturbed.*—The trial judge trying this case without a jury saw the witnesses, and heard them testify, and was in a better position to pass upon the credit to be given to their testimony than this court.

2. COSTS—*Where the Judgment is Erroneous as to Parties Not Appealing.*—The fact that a judgment is erroneous as to a defendant not appealing, does not entitle an appellant, as to whom the judgment is affirmed, to a judgment for costs.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Iroquois County; the Hon. THOMAS F. TIPTON, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

KAY & KAY, attorneys for appellant.

FREE P. MORRIS and FRANK L. HOOPER, attorneys for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

The suit was begun by attachment to recover upon a promissory note, executed by appellant and F. Peters, for \$95.75, to appellee, on the 31st of December, 1892.

Both defendants were non-residents and neither was served with process. The writ of attachment was levied upon the interest of Burke in certain real estate situated in Iroquois county, no property of Peters being found. There

Burke v. Hindman.

was no appearance by Peters or plea filed for him by any one. Burke appeared by counsel and filed a plea setting up his infancy at the time of making the note.

Issue was taken upon that plea. A jury was waived and a trial had by the court, resulting in a judgment in favor of appellee and against Burke for \$117.16.

It was contended upon the trial in behalf of appellant that he was born on the first of September, 1872, which would make him but twenty years old at the time he signed the note.

On the part of appellee it was contended that he was born on the first of September, 1871, and the court so found from the evidence. Whether the court reached a proper conclusion upon that disputed question of fact is the sole point in controversy before us.

While the testimony of two of appellant's brothers tends to show that he was born on the first of September, 1872, there is other testimony tending to show that he was born on the first of September, 1871. There was evidence of statements frequently made by him which, if true, fixed the date of his birth in September, 1871.

Such statements were made to two different school teachers, to an insurance agent soliciting for life insurance, and to parties inquiring as to his age with a view to accepting him as the maker of a note.

While appellant was not estopped by such statements from interposing the defense of infancy, such statements were properly received as admissions bearing upon the disputed question of fact.

As the court saw the witnesses and heard them testify he was in a better position to pass upon the credit to be given to their testimony than we are. We are not disposed to disturb the finding of the court below.

The record shows that judgment was entered against the "defendants" instead of against Burke alone. This was perhaps done inadvertently. Of course no judgment could be legally rendered against Peters, because the court did not have jurisdiction of his person.

Appellant has filed a motion in this court to tax appellee with the costs, and urges that appellee should be required to pay the costs, even if we conclude that the judgment against Burke should stand. It must be remembered that this appeal is prosecuted by Burke alone. He brought the record here for the sole reason that the judgment against him was wrong. The fact that the clerk, in writing up the judgment, may have written the word "defendants" instead of "defendant" does not entitle appellant to a judgment of costs.

If the court pronounced judgment against both defendants the matter could have been corrected there. *Moore v. The People*, 108 Ill. 484. The judgment against Burke will be affirmed and the motion to tax costs against appellee will be overruled.

Almon H. Reed et al. v. Alvin Kidder.

1. *WITNESSES—Competency of a Complainant When the Defendant Claims as Heir of a Deceased Person.*—The complainant, in a bill to foreclose, as a mortgage, a deed absolute on its face, can not be allowed to testify as to the amount due, where the suit is against the heirs of the alleged mortgagor, upon the ground that he is testifying in the interest of the defendants by showing that the transaction was a mortgage.

2. *LIMITATIONS—As a Bar to a Mortgage.*—The only limitation law that could be invoked under the circumstances of this case (a suit to foreclose a mortgage) was that of twenty years' adverse possession.

BILL, to foreclose, as a mortgage, a deed absolute on its face. Error to the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed June 26, 1897.

SHEEN & GRAY, attorneys for plaintiffs in error.

JACK & TICHENOR, attorneys for defendant in error.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On the 17th of June, 1868, Augustus Reed and his wife executed and delivered to George Kidder a deed for sixty

Reed v. Kidder.

acres of land situated in Peoria county. At the same time, and as a part of the same transaction, Kidder executed to Reed a lease for the land for the period of five years, at a stated rental of \$120 and the payment of taxes. It was further provided in the lease that if Reed should pay to Kidder the sum of \$1,200, in addition to the rents as they should become due, according to the terms of the lease, then Kidder, his heirs and assigns, should execute and deliver to Reed, his heirs and assigns, a warranty deed for the land.

Reed died in the spring of 1880 and Kidder died in the fall of the same year, both intestate.

Regarding the transaction of 1868 as a mortgage, the defendant in error, being the brother and heir of George Kidder, on the 24th of March, 1886, filed in the Circuit Court a bill of foreclosure against the widow and ten children of Augustus Reed.

On the 23d of December, 1887, a decree was entered by the Circuit Court. The amount found due was \$3,236.34. In the following June a sale was made which was approved by the court. This writ of error is prosecuted by three of the defendants in the foreclosure proceedings, who assert that they have reached their majority within five years last past. They seek a reversal of the decree for the reasons: 1st, that the evidence does not sustain it; 2d, that the evidence was incompetent; 3d, that the debt was outlawed by the statute of limitations; 4th, that the rights of the plaintiffs in error to the land were superior to those of the defendant in error.

It was not contended upon the trial that the transaction was not a mortgage; nor is there any such contention here. It is insisted that there is no competent proof to support the finding that the amount due was \$3,236.34 however. The only testimony by which such conclusion could be reached was that of the complainant. He was not a competent witness to prove the indebtedness by.

It is insisted by defendant in error that, as the testimony given by him was in proof of the position that the transaction was a mortgage, his testimony was in the interest of the plaintiffs in error, and really against his own interest.

If there had been any question in dispute over the averment in the bill that the transaction was a mortgage, there would be some room for such a view. But there was not. It was contended, as appears from the answer, that the complainant was not entitled to the relief sought, because the rate of interest charged was usurious, and that, more than sixteen years having elapsed since the accruing of the action, the same was barred by the statute of limitations.

When the bill was filed, the defendants could admit that the transaction was a mortgage (which it was their interest to do, of course), and insist upon competent proof as to the amount due.

But whether they did so or not the complainant would not—upon the ground that he was testifying in the interest of the defendants, by showing that the transaction was a mortgage—be permitted to testify as to the amount due. If he was, and his evidence was all there was upon the subject of indebtedness, the decree should be reversed. That is this case.

We think it proper to reverse the decree and remand the cause, that other evidence as to amount due may be taken. We may say, also, that the particular statute of limitation invoked as a defense does not apply. If the defendants were in possession of the land, the transaction being a mortgage, they were in possession as tenants at will. The only limitation law that could be invoked under the circumstances was that of twenty years' adverse possession. *Locke et al. v. Caldwell*, 91 Ill. 417. Reversed and remanded.

Griffith Brothers v. Lewis G. Hall.

1. JOINT LIABILITY—*Not Shown by the Evidence*—Under the facts of this case, as shown by the evidence, the appellees have no right of action against appellant, and the judgment must be reversed.

Assumpsit, on the common counts. Appeal from the County Court of Peoria County: the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the December term, 1896. Reversed without remanding. Opinion filed June 26, 1897.

Griffith Brothers v. Hall.

IRWIN & SLEMMONS, attorneys for appellant.

ELMER J. SLOUGH and ALBERT B. MARSTON, attorneys for appellees; H. C. FULLER, of counsel.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellees, a firm engaged in wholesaling millinery goods at Indianapolis, Ind., to recover a balance of \$105.84 from Lewis G. Hall and Sarah T. Hall, his wife.

A default was entered against Sarah T. Hall, and Lewis G. Hall, by proper plea, denied his joint liability with his wife, and a trial by jury was had upon that issue, resulting in a verdict and judgment against him for \$105.84.

It appears from the evidence that for a number of years prior to the 12th of January, 1894, Mrs. Hall had carried on a retail millinery business at 307 South Adams street, Peoria, under the name of Mrs. L. G. Hall. About that date she failed and the business was resumed in a few weeks in the name of Lewis G. Hall.

The goods, for the price of which this suit is brought, were ordered of a traveling salesman on the 14th of February and the 12th of April, 1893. They were shipped to "L. G. Hall," received at the store by his wife and disposed of as other goods were in the business. Hall denied that he received them or authorized any one to receive them in his name.

The only evidence tending to show that Hall was jointly liable with his wife was that of the traveling salesman, who testified that he was present when his wife made the selection of the goods, and that one had as much to do with the ordering as the other. He admitted, however, that at the time he knew the business was being conducted by Mrs. Hall and in her name. The greatest force that can be given to his testimony is that he regarded the business as a family affair, from the fact that Hall appeared to take an active interest in it and aided in the selection of the goods.

Against such evidence was the testimony of Hall, and an employe in the store for several years, that he was not interested in the business until the last day of March, 1894, when he started it after his wife's failure; that prior to that date the business was exclusively his wife's, and conducted as such.

It is evident the appellees regarded the purchase as made by Mrs. Hall, because all statements rendered, and letters addressed, were addressed to her. They were in no wise misled as to the ownership of the business. Upon the facts they have no right of action against Hall.

In the view we take of the case, therefore, it is not necessary to consider in this opinion alleged errors upon instructions.

We find that there is no cause of action, and reverse the judgment as to Lewis G. Hall, but do not remand the cause.

70	502
896	459

**Thomas Squires and Daniel M. Grahām v. Arthur
Adams and Samuel B. Adams.**

1. **VERDICTS**—*Upon Conflicting Evidence*.—It was the peculiar province of the jury to decide the disputed questions of fact involved in this case, and the court is not prepared to say that they decided them incorrectly.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Carroll County; the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

HENRY MACKAY and **DOUGLASS ALLEMAN**, attorneys for appellants.

RALPH E. EATON and **W. H. A. RENNER**, attorneys for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Appellants sued in assumpsit to recover on a promissory

Squires v. Adams.

note executed by appellees on the 9th of April, 1888, for \$333.59 and interest at the rate eight per cent, due one year from date. The defense interposed was that the note had been paid by a new note executed by Arthur Adams, Andrew S. Adams and John Zuck. Before a jury the defense of payment was successful.

It seems from the evidence that the note sued on had been due for some time, and that appellants had been urging Samuel B. Adams, the only solvent maker, to pay it. He was surety on the note for Arthur Adams, and had been keeping the payees from enforcing collection by suit upon representations that he could get Arthur to turn over property to him to pay with. Finally it was agreed between him and the payees, he claims, that a new note for the full amount of the principal and interest, with Arthur Adams, Andrew J. Adams and John Zuck as makers, due in six or seven months, would be accepted in payment. He testified that he procured a note and delivered it to Squires, who, after examining it accepted it, and then delivered to him the old note, which he destroyed.

There was a sharp conflict between his testimony and that of Squires as to what was said when the new note was proposed and as to what occurred when the new note was delivered and the old one surrendered. Squires testified in effect that there was an agreement to accept a new note in the place of the old one, but that Samuel B. Adams was to be one of the makers of such new note. He further testified that when the new note was brought to him he did not scrutinize it closely, but accepted it with the supposition that Samuel B. Adams' name was on it.

Counsel for appellants invoke the aid of the familiar rule of law that the giving and acceptance of a new note in consideration of an old one does not discharge the old obligation. They also contend that if Squires delivered up the old note to Samuel B. Adams under a misapprehension of the fact that Samuel B. Adams had not signed the new note, and Samuel B. Adams was aware of the fact, then appellants have the right to hold the old note as a valid and subsisting obligation.

There is no room for cavil over the legal propositions involved in this controversy. Whether appellants accepted the new note as payment or as collateral does not arise. Both parties agree that it was understood that when the new note should be accepted it would be in discharge of the old one. The disputed questions of fact were whether Samuel B. Adams' name was to be on the new note and whether, when it was accepted, Squires knew it was not. It was the peculiar province of the jury to decide those questions. We are not prepared to say that they decided them incorrectly.

The instructions given for the defendants seem to be in harmony with the views of this court, so far as they were expressed when the case was heard before. The same may be said of the rulings of the court upon the admission of evidence. *Adams v. Squires et al.*, 61 App. 513. Counsel take issue with us upon the views therein entertained upon the testimony of John Zuck. We still think the testimony of Zuck inadmissible.

We see no reason for reversing the judgment. Judgment affirmed.

CRABTREE, J., took no part.

70	504
75	395
70	504
106	80
d106	94

H. W. Wells and Stephen Martin v. Wallace Mathews.

1. *PRACTICE—Judgment in Excess of Damages Claimed in Summons.*—Rendering judgment in excess of the damages stated in the summons is not ground for the reversal of a judgment, where the proper amount is stated in the praecipe and the declaration, if the objection is first made on appeal.

2. *DEFAULTS—Plea on File.*—It is error to render judgment against a defendant by default, when his plea to the merits is on file.

Assumpsit, on a promissory note. Error to the County Court of Peoria County; the Hon. R. H. LOVETT, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed June 26, 1897.

Wells v. Mathews.

I. C. PINKNEY, attorney for plaintiffs in error.

The judgment of the court below was in a sum greater than the amount claimed in the writ. The writ claimed two hundred dollars, and the judgment was for two hundred and twenty-one dollars and fifty-five cents, twenty-one dollars and fifty-five cents more than was due the plaintiff by his writ. It is insisted that this judgment was erroneous. *Miller v. Glass*, 11 Brad. 560; *Epley v. Eubancks*, 11 Brad. 272.

The Supreme Court of this State has more than once held that where the assessment of damages is, on issue, joined, and the jury is not waived, the damages must be assessed by a jury. *Whiteside v. Bartleson*, Breese, 71; *Klein v. Wells*, 82 Ill. 201.

When issue is tendered the opposing party has no right to ignore it and proceed as if no issue was tendered. *Moore v. Little*, 11 Ill. 549; *Weatherford v. Wilson*, 2 Scam. 253; *Pana v. Humphreys*, 39 Ill. App. 641; *Barnett v. Craig*, 38 Ill. App. 96.

This honorable court has held that a judgment by mistake in such a case can not stand. *Faurot v. Park Bank*, 37 App. 322.

FOSTER & CARLOCK, attorneys for defendant in error.

It is fatal to the position insisted upon by defendants (below) that they took no exceptions to the judgment entered against them. No motion for a new trial or in arrest of judgment was made, nor did defendants save any exceptions to the decision of the court. Had they done so by motion for a new trial, or in arrest of judgment, or by exception to the decision of the court, stating that the finding of the damages was in excess of the damages claimed in the summons, the error could have been, and no doubt would have been, corrected at once. *Utter et al. v. Jaffray & Co.*, 114 Ill. 470; *Met. Acc. Assn. v. Froiland*, 161 Ill. 40; *Cunningham v. Alexander*, 58 Ill. App. 296.

The objection that the court tried the case without the intervention of a jury, there being no waiver of a jury, is not well taken. "The statute gives the right in such case

to assign error only where the decision assigned for error was excepted to." *Parsons v. Evans*, 17 Ill. 238.

OPINION PER CURIAM.

This was an action on assumpsit to recover on a promissory note for \$200. The declaration contained a special count on the note and the common counts. The praecipe and declaration laid the damages at \$500, while the writ only demanded \$200. The summons was issued December 20, 1895, and served December 27, 1895. On January 8, 1896, the defendants filed the plea of the general issue. On January 27, 1896, the court, without noticing the plea, had the defendants called and defaulted, and, without the intervention of a jury, assessed the plaintiff's damages at \$221.55, and rendered judgment against them for that amount. It is assigned for error that the court rendered judgment for a greater amount than the damages claimed in the writ, but as this question was not raised in the court below, and no exception was saved to the action of the court in this behalf, we hold the objection can not be raised for the first time in this court. Had the objection been made in the trial court, an opportunity could have been given to amend the writ so as to correspond with the praecipe and declaration, in which the damages were laid in a sum greater than the amount of the judgment. *Utter et al. v. Jaffray & Co.*, 114 Ill. 470; *Met. Acc. Assn. v. Froiland*, 161 Ill. 40.

It is also assigned for error that the court disregarded the plea, entered a default and assessed the damages thereon while the plea was on file and undisposed of. In this we think there was manifest error.

It has been frequently held that where a plea has been filed, unless it has been stricken from the files or otherwise disposed of, the court is powerless to enter the default of the defendant. *Mason v. Abbott*, 83 Ill. 445; *Parrott v. Goss*, 17 Ill. App. 110; *Faurot v. Park Bank*, 37 Ill. App. 322; *Sammis v. Clark*, 17 Ill. 398.

For this error the judgment will be reversed and the cause remanded.

Reversed and remanded.

Augustine W. Wright et al., Partners, etc., v. George
Avery, Adm'r, etc.

70 507
172 313

1. VERDICTS—*Upon Conflicting Evidence.*—When there is a serious conflict in the evidence, it is the duty of the jury, who see the witnesses and hear them testify, to reconcile the contradictory statements if they can, or if that is impossible, to decide upon which side the truth lies. To warrant a court of appeal in disturbing the finding of the jury, it should be so manifestly against the weight of the evidence that the court can say without hesitation that it ought not to stand. And under this rule the court, on a careful examination of the whole record, declines to disturb the finding in this case.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

HILL, HAVEN & HILL, attorneys for appellants.

REYNOLDS & PURKHISER and JOHN C. PATTERSON, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case, brought by appellee as administrator of the estate of William Freeman, deceased, to recover damages for injury to the means of support of the next of kin. Deceased was killed in consequence of being struck with a stone, thrown from a blast fired by the servants of appellants, on May 4, 1895, while working upon the Sanitary Drainage Canal near the city of Lockport, in said Will county.

There was a trial by jury and verdict for appellee for \$2,500. A motion for new trial being overruled, there was judgment on the verdict.

Appellants bring the case to this court and insist upon a reversal, mainly for the reason, as they claim, that the verdict is against the weight of the evidence. It does not

seem to be very seriously urged that the instructions were erroneous, nor is there any complaint that the trial court erred in admitting or rejecting evidence, so that substantially the only question for our determination is one of fact.

It appears from the evidence that on May 4, 1895, appellants were operating a certain section fifteen of the Sanitary Drainage Canal, upon which they were engaged in excavating and removing from the line of the canal, rock, gravel and stone, and that in carrying on such operations they used dynamite and gunpowder for blasting purposes, holes being drilled in the rock and loaded with the explosives, which were subsequently discharged by means of an electric battery. That the deceased was employed by one Dion Geraldine on section fourteen of the same drainage canal, being the section adjoining and immediately north of the one operated by appellants.

There is no dispute as to the fact that deceased was killed by a stone thrown from a blast fired by the servants of appellants, and the negligence charged is, failing to give proper or necessary signals that the blast was about to be fired, so that persons in the vicinity could get out of the way and avoid the danger. Whether or not such signals were given, was the material question in the case, it being substantially conceded that a failure to give them before firing the blast would be such negligence on the part of appellants as to render them liable for damages occurring as a result of such failure. On this subject there was a serious conflict in the evidence, and it was for the jury, who saw the witnesses and heard them testify, to reconcile the contradictory statements if they could, or if that were impossible, then to decide upon which side the truth lay.

As was said in *Corwith v. Colter*, 82 Ill. 588, "There is an irreconcilable conflict in the material portions of the evidence and it was for the jury to determine the preponderance, and we can not interfere. In cases of such conflict what, on paper may appear to be slight circumstances, when seen and heard, may, and frequently do, have a controlling influence in determining the weight to be given to the

evidence. Many things in a trial in the court below can never be brought to this court, and they frequently properly control the finding of a jury. They have the witnesses before them, and their manner of testifying can not be transferred to paper, and hence, all aids to the jury, derived from that source, can not be considered by the Appellate Court."

This language is peculiarly applicable to the case at bar, and even though upon the face of the record a count of the witnesses might show a greater number testifying that the signal was given than to the contrary of that proposition, yet that fact alone would not authorize us to set aside the verdict. To warrant us in disturbing the finding of the jury, it should be so manifestly against the weight of the evidence that we could say without hesitation it ought not to stand. This we can not do in the state of the record.

The jury not only found a general verdict for appellee, but were required to find specially as to whether or not any signal was given before the blast was fired. On this question, thus specifically called to their attention, the jury found against appellants, and the judge who tried the cause and heard the witnesses testify, having the same opportunities for observation that the jury had, permitted their verdict to stand. The presumption is that the judge who tried the cause has done his duty as well as that the jury have done theirs. For anything that we can know, it may have appeared to the court and jury that the decided weight of the evidence was manifestly with the appellee, and we must therefore leave the credibility of the witnesses and the worth of the evidence to the jury, where the law places it. On a careful examination of the whole record we decline to disturb the finding in this case.

The instructions complained of are the usual "stock" instructions, almost invariably given in cases where there is a sharp conflict in the evidence, and only lay down well known rules regarding the credibility of the witnesses and the preponderance of the evidence. We find in them no error of a reversible nature.

The judgment of the Circuit Court will be affirmed.

70	510
75	440
70	510
175	238

Chicago & A. R. R. Co. v. John Glenny and Martin Glenny.

1. **RAILROADS—Proof of Liability for Damage Caused by Fire.**—In a suit to recover for damages alleged to have been occasioned by fire set by sparks from a locomotive, if it is shown that such sparks set the fire, a *prima facie* case is established, and the burden is thrown upon the defendant to rebut the liability.

2. **SAME—Liability for Damage Caused by Fire.**—In a suit to recover for damages alleged to have been occasioned by fire set by sparks from a locomotive, if it is shown that the fire actually started in the railroad company's right of way, in consequence of dangerous combustible materials having been negligently left thereon, a clear case of negligence is made against the company, without reference to the condition of the engine.

3. **PLEADING—Plea of General Issue Does Not Put in Issue Incorporation of a Defendant Company.**—In a suit against a railroad company to recover for damages alleged to have been occasioned by fire set by sparks from a locomotive, if the defendant plead only the general issue, proof that it is an incorporated company is not required.

Trespass on the Case, to recover for damage caused by fire. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

GEORGE S. HOUSE, attorney for appellant.

R. W. BARGER and HALEY & O'DONNELL, attorneys for appellees.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case, brought by appellees against appellant to recover damages for the destruction of property by fire, alleged to have been communicated by one of appellant's engines drawing a train of cars on its railway, running past appellees' premises.

The first trial of the cause resulted in a disagreement of the jury, but upon a second trial there was a verdict in favor of appellees for \$7,849.18.

The trial court required a remittitur of \$1,349.18, and

that being entered, a motion for a new trial was overruled and judgment rendered for \$6,500, to reverse which appellant prosecutes this appeal.

Numerous errors are insisted upon as grounds of reversal, principal among which, it is urged that the evidence is not sufficient to support a verdict under either count of the declaration. It is also claimed that there is error in the instructions and that the damages are excessive.

A very careful examination of the record satisfies us that neither of those claims furnishes a sufficient reason for reversing the judgment.

There can be no reasonable question, under the evidence, that the fire which destroyed appellees' property, was communicated by, and started from, a passing locomotive engine drawing one of appellant's trains. Under the statute this was full *prima facie* evidence to charge appellant with negligence. Rev. Stat. 1874, p. 814; 2 Starr & Curtis, 1949, par. 104. Whether this *prima facie* case was rebutted by appellant, was a question of fact for the jury, and we see no sufficient reason for interfering with the verdict on that point. Notwithstanding appellant's proofs as to the proper equipment and handling of the engine, the fact remains that a shower of sparks was seen to be escaping therefrom while it was passing by appellees' premises, and by reason thereof their property was destroyed. Philip Hayes, living on a farm adjoining that of appellees, testified that he saw the train when it passed; that the engine was throwing a shower of sparks thirty feet high, "like a shower of hail or a thick snow fall." Thomas Jackson, another neighboring farmer, testified that "as the engine passed along there was a great quantity of sparks flowing out." Jacob Talmage, another witness, testifies to seeing the train pass, and that the engine was throwing sparks, according to his judgment, thirty feet in the air. To the same effect is the testimony of appellees. Now, if the testimony of these witnesses is true (and it was for the jury to say whether it was or not), then something was wrong, either in the equipment or the handling of the engine. The expert wit-

nesses who testified for appellant, say that if the engine is properly equipped and properly handled sparks will not thus escape, and their evidence shows that if the engine allows a large quantity of fire to escape from the smoke-stack and set fire along the right of way, it is either out of order or else improperly handled.

In this state of the evidence it was for the jury to say whether the *prima facie* case made out by the appellees had been rebutted by appellant. St. Louis, A. & T. H. Ry. Co. v. Strotz, 47 Ill. App. 342; Louisville, etc., Ry. Co. v. Spencer, 149 Ill. 97; Lake Erie & Western Ry. Co. v. Kirts, 29 App. 175; Wabash R. R. Co. v. Smith, 42 App. 527.

But there was evidence in this case from which the jury were warranted in finding that the fire actually started in appellant's right of way, in consequence of dangerous combustible materials having been negligently left thereon by appellant, and if it did, this made a clear case of negligence against appellant, without reference to the condition of the engine. C. & E. Ill. Ry. Co. v. Goyette, 133 Ill. 21.

Objection is made that there is no proof appellant was an incorporated company, and that therefore no case was made against it under the statute, and because of such want of proof some of the instructions are erroneous. But appellant was declared against as an incorporated company, and appears to have been served with process as such. There was no plea of *nul tiel corporation* filed, the only plea of appellant being the general issue. Nor does the question appear to have been in any manner raised in the court below. Under the pleadings we do not think it was necessary to put in affirmative proof of the incorporation; but at any rate the question ought not to be raised in this court for the first time, and so far as that point is concerned we hold the objection insufficient to warrant a reversal. We find no substantial error in the instructions.

As to the point that the damages are excessive, we think the remittitur entered was amply sufficient to cover the value of any property concerning which there might be a doubt of appellees' right to recover for. It is true the

Over v. Carolus.

amount of the judgment is large, but it is warranted by the evidence, and we can not say the damages are excessive.

The question raised by appellant concerning the ownership of the property, as between the heirs of the elder Glennys, and also as to the respective rights of appellees and the insurance company, or the contract existing between them, we think are matters with which appellant has no concern. If, by its negligence, appellant destroyed appellees' property, it should pay the damages; and so far as appellant is concerned, it is immaterial whether the insurance company or appellees get the money.

Finding no serious error in the record, the judgment must be affirmed.

John Over v. J. K. Carolus.

70 513/
171 559/

1. **MORTGAGES—Deeds Absolute in Form—Compensation for Loss of Equity of Redemption.**—A deeded certain land to B in satisfaction of a debt, taking an agreement for a reconveyance upon payment of the amount due within two years. B sold the land to C for the amount of the debt and C traded it for other property with the advice and co-operation of A. At a later date A filed a bill alleging that the transactions between himself, B and C amounted to a mortgage of the original property to C, and praying for a money decree for the value of his alleged equity of redemption. C claimed that he had no knowledge that the original deed to B was intended as a mortgage, that his own deed was absolute and that in the subsequent transactions A acted as his agent. *Held*, that as the trades had been made with the consent and acquiescence of A, whatever equity, if any, he had in the original land must be considered as transferred to the property traded for, and that it would be improper to charge C with the money value of such equity, and to give A the money, when, if the original transaction was a mortgage, C would be entitled to a payment in money by way of redemption.

Bill, for an accounting. Error to the Circuit Court of Whiteside County: the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

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Over v. Carolus.

C. L. SHELDON, attorney for plaintiff in error.

J. E. McPHERRAN, attorney for defendant in error.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a bill in equity brought by plaintiff in error against defendant in error and one Emanuel Brown, to obtain an accounting as to certain land deals and transactions originating in Whiteside county in this State. It appears that on February 18, 1887, Over was the owner of Section No. 34 in Hahneman township in said Whiteside county, which was then subject to an incumbrance or mortgage for the sum of \$6,000. That Over was indebted to Brown in the sum of \$1,000, and to various other parties to the amount of \$551. An arrangement was entered into between Over and Brown, on the date above mentioned, whereby Brown paid off this indebtedness of \$551 to other parties, and Over thereupon conveyed to Brown this Section 34, as security for the payment of \$1,551, and the latter executed a contract to Over to reconvey the land on payment of said sum of \$1,551, no reference being made in the contract to the \$6,000 incumbrance to which the land was subject when conveyed by Over to Brown. By its terms, the contract for reconveyance ran two years. There is no question that the transaction between plaintiff in error and Brown amounted in equity to a mortgage, from which the former would have had the right to redeem according to the terms of the contract, had the situation of the parties remained unchanged.

On February 19, 1887, the next day after these transactions between Over and Brown, the former made a general assignment for the benefit of creditors, and in those proceedings his assets were shown to be \$4,893.60 and his liabilities \$5,739.91. His schedule contained no reference to any interest in said Section No. 34. So far as this fact has any bearing upon the case it will be referred to hereafter.

In August, 1888, the evidence tends to show that plaintiff

Over v. Carolus.

in error owed Carolus the defendant in error (who is his brother-in-law) between \$500 and \$600 and desired the latter to advance him more money that he might go to Omaha to engage in business there. That Over having failed to pay Brown the \$1,551 due the latter, Brown had served notice on him to surrender possession of the land. At the suggestion and solicitation of Over, Carolus paid Brown the amount due him, and thereupon the latter executed a quit-claim deed of Sec. 34 to Carolus, and thereafter Brown does not appear to have had any connection whatever with the transactions between Over and Carolus.

In December, 1891, by the consent and active co-operation of plaintiff in error, Carolus traded said Sec. 34 for a certain flouring mill, elevator and town lots situated in White Cloud, Kan., in exchange for which he deeded the land in Whiteside county to one E. C. Nuzum, for an alleged consideration of \$25,400, subject to a mortgage of \$6,000, which Nuzum assumed and agreed to pay. The mill and elevator property was valued in the trade at \$19,000.

Carolus went to White Cloud and operated the mill for two or three years, as he claims, at a loss of \$3,000, at the end of which time, with the consent and active co-operation of plaintiff in error, Carolus traded off the mill and elevator property for lands in Nebraska and Missouri, and for a store building and lots in Nebraska, the title to which he apparently still holds, and the value of which under the evidence, appears to be a matter of a good deal of uncertainty.

The bill proceeds upon the theory that the transactions between Carolus, Over and Brown, in relation to Sec. 34, amounted to a mortgage from Over to Carolus, from which the former would have the right to redeem, and the bill prays for such right, or, in the event that no redemption can be decreed because the land has passed into the hands of an innocent purchaser, then it asks for a money decree against Carolus for the value of Over's alleged equity in said Sec. 34. So far as Brown is concerned, he is not brought into this court by the writ of error. The bill sought to charge him with the payment of the \$6,000 incumbrance

on Sec. 34, because by mistake he agreed to reconvey on payment of \$1,551, but there was clearly no equity in that claim and no honest reason why Over should have made it against him.

In his answer defendant in error strenuously denies that there was any intention, understanding or agreement that the transaction whereby the title to Sec. 34 became vested in him, was to constitute a mortgage between Over and himself. He insists that he purchased the land in good faith, for full value, and without any knowledge of the contract between Brown and Over for a reconveyance on payment of the amount due from the latter to the former, and without any agreement on his own part to reconvey or account in any way to Over for the proceeds of Sec. 34. He insists that in the later transactions, resulting in the exchange for the mill and elevator property, and in the trade of the latter property for the lands in Nebraska and Missouri, and wherein he consulted and co-operated with Over, the latter was merely acting as his agent, and not as owner in behalf of himself. Upon this point we are bound to admit that there is much in the evidence which tends to show that Carolus recognized Over as having some equity and interest in the transactions, and were Carolus still the owner of Sec. 34, we would be inclined to hold that Over had a right to redeem and to an accounting; but, unfortunately for him, such is not now the situation, for, by his own consent and co-operation, the conditions are entirely changed. Counsel for defendant in error has made a lengthy argument to show, and urges with a good deal of force that, because Over failed to schedule his alleged interest in Sec. 34 in the assignment proceedings, he was guilty of such a fraud upon his creditors as now debars him from obtaining any relief in a court of equity, even though the evidence might show him to be otherwise entitled to it. Under the view we take of the case, it is unnecessary for us to discuss or pass upon the proposition, as, upon other grounds, we think the plaintiff in error has failed to establish the right to a decree in his favor, and the court below was therefore right in dismissing the bill.

It is not now insisted that any redemption can be decreed as to Sec. 34, nor, indeed, could any such claim be reasonably urged. That the land has passed into the hands of an innocent purchaser, by the consent and co-operation of plaintiff in error, is practically admitted, and the present owner was not even made a party to this suit. The only contention is that plaintiff in error is entitled to a money decree for the value of his supposed equity, and much testimony has been taken as to the value of Sec. 34, and also as to the value of the lands received by Carolus in exchange for the mill and elevator property, and which, so far as the evidence shows, are still undisposed of. We regard the evidence as being entirely too unsatisfactory and speculative to form the basis of a money decree. The lands in Nebraska and Missouri received in exchange for the mill and elevator property were acquired by Carolus with the entire consent and acquiescence of plaintiff in error, and whatever equity, if any, Over had in the property traded for these lands, must be considered as transferred to them. Had the lands been disposed of, and a definite sum realized therefrom, there might be some basis for an accounting, but they are still held by Carolus, and may or may not be salable, but to charge him now with their money value, according to the conflicting opinions of the witnesses, might be the means of doing him great injustice, by loading him up with a lot of unsalable land and giving Over the money, while, if the original transaction in relation to Sec. 34 was a mortgage, then Carolus is the one entitled to the money by way of redemption. In any view we have been able to take of this case, we can not see how plaintiff in error is entitled to any relief under the bill filed and the evidence submitted, and we think the court properly dismissed the bill, and its decree will be affirmed.

Chicago & Alton Railroad Company v. Elizabeth Blaul.

1. RAILROADS—*Persons About to Cross Tracks May Rely on Flagman.*—A person knowing that a flagman is usually stationed at a railroad crossing has a right to presume that he is at his post and will do his duty, and in the absence of any warning, or signal of danger, is not chargeable with negligence in proceeding to cross the tracks.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

GEORGE S. HOUSE, attorney for appellant.

DONAHOE & McNAUGHTON, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee to recover damages for injuries sustained by her, in consequence of a collision with one of appellant's trains of cars, which came in contact with a buggy in which appellee was riding, at the intersection of appellant's railway tracks with Fifth avenue, in the city of Joliet.

There was a trial by jury, resulting in a verdict and judgment for appellee for \$5,000.

This court is asked to reverse the judgment upon the sole ground that the evidence does not show appellee was in the exercise of ordinary care for her own safety at the time of the accident which caused her injury.

It appears from the evidence that on December 8, 1894, appellee left her home in Chicago, in company with her husband and infant child, and proceeded to Joliet over appellant's railroad. On arriving at the station in Joliet, the party were met there by appellee's brother, Dennis Van Garvin, and one William Smith, who had in waiting a light spring wagon, for the purpose of conveying the visit-

ors to Van Garvin's home, about two miles southeast from Joliet.

Appellant's railway at Joliet crosses Fifth avenue nearly at right angles, and at the street crossing it has three tracks, the easterly track being the south-bound main, the one next west the north-bound main, and the westerly track being what was known as a side track.

When the party started for Van Garvin's home, there were seated in the light wagon, Van Garvin and Smith upon the front seat, the former sitting on the right-hand side and driving, while the rear seat was occupied by appellee with her babe in her arms and her husband sitting beside her, and a small boy sat in the wagon box behind the rear seat. Proceeding in this manner, easterly along Fifth avenue, the party came to the right of way of appellant's railroad, and, as they reached that point, a long freight train, consisting of about forty box cars, was then being drawn over the Fifth avenue crossing, in a northerly direction, along the north-bound main track.

Van Garvin, who was still driving, brought his horse to a stand-still, and waited for this freight train to pull across the street, and about the time the caboose or rear car reached the north sidewalk, seeing nothing to prevent his going forward, and there being no gates closed or flagman at the crossing to give notice or warning of danger, he started his horse toward home, when, just as he reached the easterly or south-bound main track, and was in the act of crossing, a train consisting of an engine and seven or eight flat cars bore down upon them at a rapid rate of speed from the north, striking the wagon in which appellee was riding, throwing the occupants of the vehicle a distance of some twenty or twenty-five feet, and inflicting upon the person of appellee serious injuries.

It is frankly admitted, by counsel for appellant, that under the ordinances of the city of Joliet it was the duty of appellant to have a flagman at the crossing, and that one is usually on duty there, but that at the particular time of this accident, he had left his post on some other business, and was

then absent from his place of duty; and counsel concedes that this was negligence on the part of the appellant. But he contends that, notwithstanding this negligence of appellant, appellee can not recover, because she had committed her safety to Van Garvin, the driver of the vehicle, and that the latter was guilty of negligence in not ascertaining that the east track was safe to cross before attempting to pass over it. That inasmuch as the view was obstructed to some extent by the freight train upon the north-bound main track he should have waited until he could know with certainty that it was safe for him to cross. It is argued that because Van Garvin knew there was usually a flagman at the crossing, he should have waited until notified by the flagman that it was safe to cross. Counsel says in his argument: "He (Van Garvin) knew that at this crossing there was stationed a flagman, whose duty it was to notify persons riding in vehicles when it was safe to cross." But we think this is a misapprehension of the duty of a flagman under the ordinance put in evidence, and is not according to the general understanding of the public, nor the almost universal custom of flagmen on such duty. It is only when there is danger, caused by the approach of trains that the flagman displays any signal, or gives any notice to the traveling public. When it is safe to cross, the flagman does nothing, as a general rule, but when there is danger he gives notice, or should do so. This being the almost universal custom, we think Van Garvin, knowing that a flagman was usually stationed at this crossing, had a right to rely on the presumption that he was at his post and would do his duty, and that in the absence of any warning or signal of danger, he was not chargeable with negligence in proceeding to cross the tracks. Had the flagman been at his post and given the danger signal the accident would not have happened. While appellee's party were waiting for this freight train to go by, other teams had gathered there also waiting to cross, and all seem to have started forward about the same time, the crossing appearing to be clear and none of them apprehending danger.

They no doubt relied upon the presumption that the

flagman was at his post, and would do his duty, warning them of danger if it existed. This presumption they had the right to indulge and to act upon.

“The flagman’s duty is to know of the approach of trains and to give timely warning to all persons attempting to cross the railroad track, and the public have a right to rely upon a reasonable performance of that duty.” C., St. L. & P. R. R. Co. v. Hutchinson, 120 Ill. 587.

Fifth avenue was a largely traveled thoroughfare, and it was the duty of appellant to keep a flagman in constant attendance there. In his absence, to run a train over the crossing at a dangerous rate of speed, was great negligence, and rendered appellant clearly liable for injury resulting therefrom to any one in the exercise of ordinary care for his or her own safety. Whether appellee was in the exercise of such care at the time of the accident was a question of fact for the jury, and we can not say their finding on that point was wrong. On the contrary, we think it was fully justified by the evidence, and we can not reverse the judgment upon that ground.

It is claimed that the damages are excessive, but we can not say that the jury were not warranted in finding the amount they have awarded.

From the evidence the jury had a right to believe that appellee has sustained an injury to the spinal cord, from which she is in danger of permanent paralysis, and if so, certainly the damages are not excessive. We do not need the testimony of expert physicians to tell us that injuries of the character received by appellee frequently do result in paralysis. The extent of the injury may not be at once apparent, but the result may be a total wreck of the entire system. The jury heard the testimony of the witnesses, and the opinions of the medical experts who had examined appellee, and they saw and had the opportunity of observing her for themselves, and we are not disposed to substitute our judgment for theirs under all the circumstances of the case.

No complaint whatever is made of the instructions, and finding no error in the record, the judgment will be affirmed.

Charles R. Wheeler, Assignee, v. Metzger Linseed Oil Company.

1. *SALES—For Future Delivery—Rights of the Parties Where the Vendee Makes an Assignment.*—A contracted with B for six hundred barrels of oil, to be delivered at such time as A might direct before a specified date. Shortly after the sale A made an assignment for the benefit of creditors and thereupon B sold the oil at a loss and filed a claim against A's assignee for the amount thereof. *Held*, that the assignment did not amount to a rescission of the contract, or to a breach thereof; that the assignee had the entire time allowed by the contract to order and pay for the oil and could not be called upon for full performance or placed in default before the expiration of that time, and that B's action gave him no valid claim against A's assignee.

Claim in Assignment Proceedings.—Appeal from the County Court of Peoria County; the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the December term, 1896. Reversed. Opinion filed June 26, 1897.

WINSLOW EVANS, attorney for appellant.

COVEY & COVEY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This appeal is prosecuted from an order of the County Court of Peoria County, allowing a claim of \$2,722.33 against the insolvent corporation of Singer & Wheeler, and in favor of appellee.

It is admitted that \$1,460.83 of this amount was due to appellee at the time of filing the claim, for oil and meal cake sold and delivered by appellee to Singer & Wheeler before the assignment; and as to so much of the allowance no objection is made. But the balance, or the sum of \$1,361.50, was allowed for an alleged loss upon a resale of 600 barrels of oil, which Singer & Wheeler contracted to purchase from appellee according to the terms of a written contract which appears in the evidence, and which was as follows:

Wheeler v. Metzger Linseed Oil Co.

“ We, the undersigned, have this day bought and agree to receive of The Metzger Linseed Oil Company, Chicago, Illinois, six hundred barrels pure linseed oil (of about fifty gallons each) delivered in Peoria, Ill., at railroad depot, as follows :

As ordered out by us between October 21, 1895, and August 1, 1896, and to be invoiced as follows : Shipments in month of October, 1895, to be 39 cents for raw; November and December, 39 cents for raw; January, 39½ cents; February, 40 cents; March, 40½ cents; April, 41 cents; May, 41½ cents; June, 42 cents; July, 42½ cents. Boiled oil, 2 cents per gallon over price of raw oil. Raw linseed oil at —; boiled or bleached, at — per gallon of 7½ pounds.

Terms of payment, thirty days, or less one per cent if paid in ten days from invoice date on each shipment. Shipments to be made as named in this agreement.

It is understood that there are no conditions relating to this purchase other than stated hereon.

SINGER & WHEELER.

P. S. SINGER, Treasurer.

Peoria, Ill., Oct. 18, '95.”

One car of oil had been ordered by Singer & Wheeler from appellee on October 17th, the day before the date of the contract, but the shipment thereof was not made until October 29th. It is a matter of dispute between the parties whether this car load of oil should be treated as a part of the 600 barrels contracted for on October 18th, or otherwise, but under the view we take of the case it is immaterial. The allowance of \$1,460.83 covers that car load.

No other shipments of oil were made by appellee to Singer & Wheeler under the contract, nor was any “ordered out” by the latter, who, on January 10, 1896, made a general assignment to appellant for the benefit of creditors.

Appellant duly qualified as assignee and gave the proper notices to creditors, including appellee.

On receipt of this notice appellee sent to appellant a letter of which the following is a copy :

" JANUARY 24, 1896.

Mr. Charles R. Wheeler, Assignee, Peoria, Illinois.

DEAR SIR: Your notice of being appointed assignee of Singer & Wheeler just received. In reply we wish to say that we have a contract with said Singer & Wheeler for ten cars of linseed oil, containing sixty barrels in each car, or a total of six hundred barrels. Said oil to be delivered by August 1, 1896. We therefore ask you to kindly give us what disposition you wish to make of this oil, as we are ready to deliver same, according to contract. With a soon answer, please oblige,

Very truly yours,

METZGER LINSEED OIL CO.,

WILLIAM G. METZGER, Sec'y.

To this communication appellant made no answer whatever.

No further correspondence or communication seems to have been had between the parties in relation to this contract, and on February 25, 1896, without any notice to the assignee or to Singer & Wheeler, appellee sold 600 barrels of oil on the market in Chicago, at thirty-five cents per gallon, and charged a loss of \$1,714.50 to the account of Singer & Wheeler, which was included in the claim filed against the insolvent estate in the County Court.

On the hearing the court reduced the amount of this item, but allowed appellee the difference between thirty-five cents per gallon, for which they sold the 600 barrels on February 25th, and forty cents, the contract price for the month of February, on the 600 barrels of fifty gallons each.

Appellant contends that the court erred in allowing any damages whatever for the alleged failure and refusal to perform the contract and receive the entire six hundred barrels of oil.

We think a proper construction to be placed on the contract is, that Singer & Wheeler had the entire time, including July 31, 1896, to order out the oil and pay for the same, and could not be called upon for full performance or placed in default before that time.

The mere fact of the assignment for the benefit of creditors did not amount to a rescission of the contract, nor to a repudiation or breach thereof on the part of Singer & Wheeler.

Counsel for appellee do not contend that the mere fact of insolvency alone will work a breach of the contract, but they do insist that the assignment of the vendee, coupled with other facts and circumstances, will justify the vendor in presuming that the vendee and his assignee have abandoned the contract. Authorities are cited which no doubt sustain this proposition, but we do not regard them as applicable to the facts of this case. Here there are no facts and circumstances shown by the evidence which evince any intention on the part of Singer & Wheeler, or the assignee, to abandon or repudiate the contract. They simply said nothing and did nothing.

Under the contract and the letter from appellee to the assignee, which we have quoted above, we think the latter had the right to assume that he had until August 1, 1896, to determine what he would do about performing the contract.

Had it then been for the best interests of the insolvent estate the assignee might have been authorized and directed by the court to perform the contract. *Singer v. Leavitt*, 83 App. 498; *Baker v. Singer*, 35 Ill. App. 271.

Our conclusion on this point is, that inasmuch as the contract gave the assignee until the end of July to perform it, he was not bound to determine what he would do about it on January 24th, the date of appellee's letter to him on that subject. His mere silence gave no right to appellee to consider the contract as rescinded, and no notice whatever was given to him after the last mentioned date.

There being then no breach of the contract on February 25, 1896, when appellee resold the oil, such sale was premature and unauthorized as against Singer & Wheeler or the assignee. It can scarcely be contended that had Singer & Wheeler, or the assignee, ordered the 600 barrels of oil on March 1, 1896, and tendered the price, that appellee

would not have been bound to deliver it. The contract did not require that oil should be ordered in any particular month, nor that any specific amount should be ordered at a certain time, but provided that it should be "ordered out * * * between October 21, 1895, and August 1, 1896." Yet, after the sale of the 600 barrels on February 25th, appellee never had any oil on hand with which to fill the contract had Singer & Wheeler or the assignee demanded it. This is testified to by Mr. William G. Metzger, the secretary of appellee, who further says that they "did not consider the contract at an end. * * * We took it upon ourselves to sell that much oil and put it to their credit." This we think appellee had no right to do at that time. The following authorities sustain our views upon this question: *Shaw et al. v. Lady Ensley Coal Co.*, 147 Ill. 526; *Bagley v. Findlay*, 82 Ill. 524; *Saladin v. Mitchell*, 45 Ill. 79; *Florence Mining Co. v. Brown*, 124 U. S. 385.

If the contract was not at an end, appellee had no right to sell the oil and charge the loss to Singer & Wheeler, and certainly no authority is shown to make the sale as their agents, and when they assumed to do so they acted at their peril. The mere fact the market was declining would not authorize a sale. From anything appearing in the evidence to the contrary, the oil might have been sold at a profit in July, the last month in which Singer & Wheeler had the right to complete the contract.

We think the court erred in refusing to hold, as the law governing the case, propositions numbered 1, 2, 3, 4, 6, 7 and 8, submitted by appellant. They correctly set forth the law applicable to the facts as shown by the evidence, and should have been so held.

The court also erred in allowing any portion of the claim for breach of contract as to the six hundred barrels of oil in controversy, and its order must be reversed.

Ferdinand Ribordy v. Bronson Murray et al.

1. **APPELLATE COURT PRACTICE—Enforcement of Rules.**—While the filing of briefs by an appellee after the time allowed is improper and irregular, whether the strict terms of the rule applicable in such cases are to be enforced in any particular case, is a matter within the discretion of the court, and a decree will not be reversed *pro forma* if the court, on an examination of the record, deems it proper to decide the case upon its merits.

2. **EQUITY PRACTICE—Applications for Rehearing in the Trial Court.**—It is not necessary that an application be made for a rehearing in the trial court before an Appellate Court can entertain an appeal from a decree in chancery.

3. **DRAINAGE—The Act of 1889 Construed.**—The construction of independent ditches, by owners of adjoining lands, and the connecting of them together so as to form a continuous system of drainage across the lands of the several owners, by mere acquiescence and without any special agreement or license, will bring the case within the drainage act of June 4, 1889.

4. **SAME—Right to Close Ditches Must be Clearly Established.**—A person filing a bill under the drainage act of June 4, 1889, and asking for an order approving and confirming his action in closing up a ditch which for several years had been carrying off water from the land of adjoining owners, is bound to show a clear legal right, and if upon the allegations and proofs upon his bill there be a reasonable doubt of the right, the order should be denied.

5. **SAME—Right of Owner of Dominant Heritage.**—The owner of the dominant heritage has the right to have the waters accumulating on his land, flow therefrom to the serviant heritage, as freely and unobstructedly as it would do in a state of nature.

6. **SAME—Right of Owner of Dominant Heritage to Construct Ditches.**—The owner of the dominant heritage may make such ditches or drains for agricultural purposes on his own land as may be required by good husbandry, although by so doing the flow of water may be increased in the natural channel which carries the water from the upper to the lower field.

7. **SAME—Filling up Ditches.**—After water has passed through a channel for a number of years, with such force and in such volume as to produce a large ditch, it becomes extremely difficult, if not impossible, to ascertain where the surface originally was, and a court will not sanction the filling up of such a ditch on the assumption that the water would thereafter flow as it did in a state of nature, where such a proceeding would impede and interrupt the natural flow of the water and throw it back upon the dominant heritage.

8. **WATER COURSE—The Term Defined.**—If the conformation of land

is such as to give the surface water flowing from one tract to another a fixed and determinate course so that it is uniformly discharged upon the serviant tract at a fixed and definite point, the course thus uniformly followed by the water in its flow, is a water course, within the meaning of the rule applicable to the subject.

BILL, to confirm an alleged right to close a ditch, and cross-bill to compel the removal of obstructions therefrom. Appeal from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term 1896. Affirmed. Opinion filed June 26, 1897.

TORRANCE & TORRANCE and R. S. McILDUFF, attorneys for appellants.

C. C. & L. F. STRAWN, attorneys for appellees.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a bill in equity, filed by appellant June 30, 1890, against appellee Murray as the owner of the north half of Sec. 22, in township 30 N., R. 6 east in said Livingston county, and also against the commissioners of highways of said township, as having official control and jurisdiction of the highways in said township.

The proceeding was instituted under an act of the legislature approved June 4, 1889, in force July 1, 1889, entitled "An act declaring legal, drains heretofore or hereafter constructed by mutual license, consent or agreement by adjacent or adjoining owners of land, and to limit the time within such license or agreement heretofore granted may be withdrawn." 3 Starr & Curtis, p. 475.

The bill alleges that appellant was the owner of the S. $\frac{1}{2}$ of the S. W. $\frac{1}{4}$, the N. $\frac{1}{4}$ of the S. W. $\frac{1}{4}$ and the W. $\frac{1}{4}$ of the S. E. $\frac{1}{4}$ of Sec. 15, in said township 30, and that immediately south of his land there is a public highway, upon the south side of which, and within twenty years prior to the filing of the bill, said commissioners of highways had constructed a ditch, to a bridge under a highway, connecting this ditch with an open ditch on appellant's land north

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of the highway; that appellee Murray, owned the land south of this highway and directly opposite that of appellee, the land of Murray being in section twenty-two of the same town; that said Murray had constructed a ditch on his land to the point directly opposite the bridge under the highway and connecting with the ditch constructed by the commissioners along the highway; that by means of these ditches the water falling on said highway and the lands adjoining, and upon the Murray land, or a part thereof, was carried through these several ditches and discharged into the ditch on the land of appellant with which the highway ditch had been connected; that neither of the appellees had any written authority to discharge the waters from said ditches into the ditch on the land of complainant; that the same had not been constructed for a period of twenty years so as to give a prescriptive right, and that the ditch on the land of complainant was not a natural water course; that complainant exercising his right under the law had closed the ditch on his land opposite the said bridge under the highway, and declared thereby a revocation of any right to the use of the same by appellees. The prayer of the bill is for confirmation of the right of complainant to fill up the said ditch on his land.

The answer of the defendants (appellees) to the bill admitted the construction of the highway ditch, and that on the land of Murray, and their connection with the ditch on the land of appellant, and averred the right to so construct and connect the same, and denied all the other material allegations of the bill.

Appellee Murray filed a cross-bill, the material part of which charged that by the closing of the ditch by Ribordy, the natural flow of the water from his land across Ribordy's was obstructed, and praying that Ribordy be compelled to remove the obstruction and permit the waters to flow through said ditch.

A supplemental bill was filed by appellee Murray, alleging that since the filing of the original bill appellant had filled up twenty rods or more of the ditch on his land north

of the first obstruction, and praying that he be required to remove that, as well as the dam he had first placed in said ditch.

A very large amount of testimony was taken in the case, and upon a final hearing upon the issues formed upon the original bill and the cross-bill and supplemental cross-bill of appellee Murray, which were all heard together as one case, the Circuit Court entered a decree dismissing the original bill for want of equity, at the costs of appellant, and decreeing to appellee Murray the relief prayed by him in his cross-bill and supplemental cross-bill, and perpetually enjoining appellant from obstructing the ditch in question on his own land, and ordering him within sixty days from the date of the decree, to remove the obstructions he had placed in said ditch, or be considered in contempt of court.

The decree also ordered all costs on the cross-bills to be taxed against appellant, and he brings the case to this court by appeal.

A motion has been entered by appellant for a reversal of the decree under Rule 27 of this court, on the ground that appellee's brief was not filed within the time allowed by the court on their application for an extension of time in which to file the same. While the filing of briefs after the time allowed is improper and irregular, and a practice not to be encouraged, yet, whether the strict terms of the rule are to be enforced in any particular case, is a matter within the discretion of the court, and the decree will not be reversed *pro forma* if the court, on an examination of the record, deems it proper to decide the case upon its merits. The briefs being on file before the case was reached for consideration, and no motion having been made to strike them from the files, we have deemed it proper to consider the case upon its merits, and the motion will therefore be denied.

The point is made by appellees that no appeal lies in this case, because no application was made to the chancellor below for a rehearing of the cause. No authority is cited in support of this proposition, and we know of none. Cer-

tainly no such practice prevails in this State. On the contrary, appeals innumerable have been allowed and entertained from decrees in chancery, when no application for rehearing has been made in the court below. We think the point is not well taken.

A further objection is raised by appellees that the bill does not show a cause of action under the statute, in pursuance of which the suit is brought, because it does not allege that the ditches in question were made and connected with the ditch on appellant's land by the mutual license, consent or agreement of the owner or owners of the adjacent lands, so as to make a continuous line upon, over or across the lands of several owners, as provided by the statute. But the third section of the statute provides as follows: "Sec. 3. Whenever drains have been or shall be constructed in accordance with this act, none of the parties interested therein shall, without the consent of all the parties, fill the same up or in any manner interfere with the same, so as to obstruct the flow of water therein; and the license, consent or agreement of the parties herein mentioned need not be in writing, but shall be as valid and binding if in parol as if in writing, and may be inferred from the acquiescence of the parties in the construction of such drain."

We think the evidence shows that for several years prior to the damming up of the ditch on appellant's land, the ditches of appellees had been connected therewith, forming a continuous line of drainage over the lands of Murray, across the highway and over the lands of appellant, and we think the acquiescence of appellant may be inferred from all the circumstances appearing in the evidence, thus bringing the case within the spirit of the statute, upon which we are not disposed to place the narrow construction contended for by appellees. Leaving out of view for the moment the question as to whether the continuous line of ditch in controversy was constructed in a natural water course, or where the water would flow in a state of nature, and assuming that the ditches were constructed to carry water where it would not otherwise flow, we are inclined to hold

that the construction of independent ditches, by adjoining owners of lands, and the connecting them together so as to form a continuous system of drainage across the lands of the several owners, by mere acquiescence and without any special agreement or license, would bring the case within the statute. Our holding is that the allegations of the bill, if proven, made a cause of action for appellant under the statute.

The bill however alleges that the ditch on the land of appellant was not a natural water course, and we think it was incumbent upon him to prove this allegation, to the reasonable satisfaction of the court, before he would be entitled to an order approving or confirming his action in obstructing and damming up a ditch which for several years had been carrying off water from the highway and from the lands of the adjoining owner, Murray. He was seeking to interfere with and break up the order of things which had existed for a number of years prior thereto, and before he was entitled to an order or decree of court confirming or approving such action, he was bound to show a clear legal right. It seems to us the case stands upon the same footing as it would if, instead of bringing this suit after damming up the ditch, he had filed a bill for an injunction against appellees to restrain them from turning the water from their ditches into the one upon his land. And if upon the allegations and proofs upon such a bill there be a reasonable doubt of the right, the injunction would be denied. *Wilson v. Bondurant et al.*, 142 Ill. 645.

In the case just cited it was held that the act of 1889, under which this suit was brought, does not restrict or abridge the rights of drainage as they existed at common law, but that its sole purpose and effect is to enlarge those rights.

The real question in controversy in this case, and the one upon which the great mass of testimony was taken, is as to whether the ditch upon appellant's land was in the natural course or channel through which water, coming though the Murray ditch and the highway ditch, would

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find its natural outlet, and through which in a state of nature it would and ought to flow. Upon this question the court below found that the land of appellant was the serviant heritage, and the land of Murray the dominant heritage, and that prior to the filling up of the ditch by appellant, water passed in a course of nature from said dominant to the serviant heritage. The court further finds that so far as the ditch in question formed a continuous line upon, over and across the lands of Murray, the highway and the lands of appellant, it was but a natural water course.

Notwithstanding the labor involved in reading the great mass of testimony taken in the cause, we have carefully done so, and are unable to say that upon the material questions involved the court below came to a wrong conclusion.

We do not deem it necessary to discuss in detail the evidence at length, as it would probably serve no useful purpose, but we think a clear preponderance of it shows, that in a state of nature, there was a gradual flow of water from the lands of Murray on to those of appellant, which in times of high water found its outlet in a northeasterly direction across the lands of appellant, through a swale or series of depressions in the ground, until it finally emptied into Mazon creek, some distance northeast of appellant's lands. It is true there was no well-defined water course, in the sense in which that term is often used, having well-defined banks and a bed, but that was not necessary. If the conformation of the land was such as to give the surface water flowing from one tract to another a fixed and determinate course, so as to uniformly discharge it upon the servient tract at a fixed and definite point, the course thus uniformly followed by the water in its natural flow, is a water course, within the meaning of the rule applicable to this class of cases. *Lambert et al. v. Alcorn*, 144 Ill. 313.

We think a preponderance of the evidence given by witnesses who knew the land in a state of nature, before it was broken up for cultivation, shows that such a water course existed across the lands of appellant.

Some of the witnesses call it a slough, others a sag, others a gash, still others a swale, and some say there was a depression a rod or a rod and a half wide through which the water flowed on to its outlet. We think the evidence shows that the ditch on appellant's land, and which he has dammed up, runs along in this natural depression and in the line of the ancient water course. There seems to be some doubt as to how this ditch was first started. Appellant testifies there was no ditch there in 1878 when he went to the old country, and that on his return he found some one had plowed a couple of furrows, some thirty-six or thirty-seven rods long, connecting with the highway ditch, and he never could find out who did it. That nothing has ever been done to it since, except that by the action of the water and the cattle it has been deepened and widened, until it is now a ditch eighteen feet wide and three feet deep. The fact that the ditch has been so deepened and widened without human agency would seem difficult of explanation, except upon the theory that it is a natural water course, carrying large quantities of water. The mere plowing of a couple of furrows upon land where water does not naturally flow in considerable volume and amount, could hardly be expected to produce such a result.

But appellant insists that even if it be true that the ditch was located in a natural water course, yet he has the right to fill up to the natural surface of the ground, and this he claims is all he has done.

There is a conflict in the evidence as to the height of the dam. The testimony of the witness D. J. Stanford, county surveyor is, that from different levels taken by him it is shown that the dam is from three to five inches higher than the ground on each side. Other witnesses testify that the dam is a little higher than the surrounding ground.

However the fact may be, we are unwilling to assent to the proposition that if the ditch is in a natural channel or water course, the party upon whose land it is so situated has the right to fill it up to the level of the ground on each side. Such a proceeding would undoubtedly have the

effect to impede and interrupt the natural flow of the water, and prevent its free and natural passage, so that it would be thrown back upon the dominant heritage.

After the water has passed through a channel for a number of years, with such force and volume as to produce a ditch eighteen feet wide and three feet deep, it might be extremely difficult if not impossible, to ascertain what the natural surface originally was, and hence it would be very dangerous to allow the ditch to be dammed up on the assumption that the water would thereafter flow as it did in a state of nature.

There is evidence to show that notwithstanding the dam, the water still forces its way around it and reaches the old ditch in the field beyond. If this be true, it is a physical fact, tending very strongly to show that the dam is placed in a natural water course, and also that it obstructs the natural flow of the water. This appellant had no right to do. The proposition that the owner of the dominant heritage has the right to have the waters accumulating on his land flow therefrom, to the serviant heritage, as freely and unobstructedly as it would do in a state of nature, is so well recognized and understood that it needs no citation of authority in its support.

It may be true, in this case, that the construction of the highway ditch, and the ditches connecting therewith from the Murray land, have increased the volume and flow of water into the ditch on appellant's land, and that it now empties into the same with greater force than it would in a state of nature, but this can not be avoided; it is one of the inevitable results experienced in the drainage and improvement of land, which the development of the country can not always permit to remain in a state of nature. It has therefore frequently been held in this State that the owner of the dominant heritage may make such drains or ditches for agricultural purposes on his own land as may be required by good husbandry, although by so doing the flow of water may be increased in the natural channel which carries the water from the upper to the lower field. Peck et al. v.

Herrington, 109 Ill. 611; Davis et al. v. Commissioners, etc., 143 Id. 9; Lambert et al. v. Alcorn, 144 Id. 313.

This proposition does not seem to be denied by counsel for appellant, but they insist that the evidence shows the ditch in question was not in a natural water course, and that even if it were, appellant had the right to fill it up to the natural surface of the ground. We have already said all we care to say upon the subject of filling up the ditch, and we think the evidence was sufficient to warrant the court in finding against appellant upon the question as to whether or not the ditch was in a natural water course.

It is true that the bridge or culvert in the highway is not at the same place at which it was originally constructed when the highway was first graded. The witness Charles Eastman testified that in 1875 he helped to move the culvert a few rods further west than it was originally built; that appellant assisted in this work, and said that the object of moving the culvert was to make a straight course for the water. If this statement is anywhere denied by appellant, such denial has escaped our observation, and if the witness speaks truthfully and recollects correctly, this would be a strong circumstance tending to show that appellant then recognized the right of the water to flow under the highway and upon his land immediately north of it. On a careful examination of the whole case we are not prepared to say the decree is erroneous. The appellant failed to establish his right to maintain the dam in question, and therefore his bill was properly dismissed. Upon the cross-bill we think appellee Murray was entitled to the relief prayed, and the court properly granted it. We find no error in the decree upon the question of costs. The decree will be affirmed.

James Milligan, Jr., v. William H. Hinebaugh.

1. **CONTRACTS**—*A Sealed Instrument May be Abrogated by Parol.*—A contract under seal may be abrogated, canceled and surrendered by an executed parol agreement.

Covenant, on a real estate contract. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

BREWER & STRAWN, attorneys for appellant.

D. B. SNOW and D. F. TRAINOR, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of covenant to recover for interest and taxes alleged to be due from appellee to appellant, upon certain articles of agreement, under seal, dated April 10, 1893, whereby appellee agreed to purchase from appellant a certain lot in Highland Park, South Ottawa, Illinois. The purchase price was \$800, of which \$50 was payable May 1, 1893, the balance to be paid on or before ten years, with interest at six per cent per annum, payable annually; appellee to pay all taxes subsequent to 1892. On April 18, 1893, appellee paid the \$50 which would become due May 1st.

About a year afterward appellee asked for an extension of time in which to pay interest, and appellant, not needing the money then, told appellee he would let him know when he wanted it. Appellee not having paid the taxes, appellant paid them, and the amount was refunded to him by appellee.

Appellee claims that at Streator, at a gathering which the evidence seems to show was held on June 5, 1894, appellant released him from the further performance of the contract, and agreed to take back the agreement. This is denied by appellant; but it is not disputed that on June 11, 1894, appellee sent to him the written agreement, together

with the abstract of title to the property, accompanied by a letter, of which the following is a copy :

OTTAWA, ILL., June 11, 1894.

Mr. James Milligan, Ottawa Ill.

DEAR SIR: I herewith enclose you the contract and abstract relative to lot one (1), in Highland Addition. I have done my best for months past to sell the lot, without success. I do not feel able to carry it in connection with the property that I recently purchased, and feel that the papers should be turned over to you in order that you may sell the lot again, should occasion offer. I believe I have paid sufficiently for my one year option. Should like to hold it, but do not find it possible.

Yours respt.,

W. H. HINEBAUGH.

Appellant made no reply to this letter, but retained the possession of the contract and abstract of title, apparently without objection, until this suit was brought, which appellee swears was the first notice he had that appellant would insist that the agreement was still in force and would seek to enforce its performance.

There was a trial by jury resulting in a verdict for defendant, and a motion for new trial being overruled, there was judgment in favor of appellee.

The case seems to have been tried in the court below and submitted to the jury upon the question of fact as to whether there had been a mutual agreement between the parties to rescind the contract. There was a sharp controversy between the testimony of appellee and appellant upon this question, which it was for the jury to reconcile if they could. No doubt the fact that appellant received the written agreement and abstract of title from appellee, and retained them for more than a year, without objection, and without calling upon appellee for the payment of interest or taxes, and giving no notice whatever of a refusal to consider the contract at an end until he brought this suit, had its due weight with the jury, and may have turned the scale in favor of appellee when they came to weigh the evidence.

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Indeed the actions of appellant may almost be said to amount to an exercise of the option given him in the contract to declare a forfeiture for non-performance. Under all the circumstances we can not say the jury were not warranted in finding that the parties had agreed to rescind the contract.

It is urged that, inasmuch as the contract was under seal, it was error for the court to admit evidence of a parol agreement to rescind and many authorities are cited in support of the proposition that it is not competent, either at common law or under the law of this State, to modify or change articles of agreement under seal by proof of a subsequent parol understanding or agreement.

While fully admitting the existence of this rule, we think the authorities cited are not in point, as applied to the facts of this case.

The proofs were not offered for the purpose of showing an alteration, change or modification of the agreement under seal, but to show an executed parol agreement, whereby the contract under seal had become abrogated, canceled and surrendered, and this we understand it is entirely competent to do. Whether or not there has been such a cancellation and surrender is a question of fact for the jury. *Alschuler v. Schiff*, 164 Ill. 300.

It is urged that the court erred in giving, refusing and modifying instructions, but a careful examination of the record has satisfied us that the jury were fairly and fully instructed upon the law of the case and without discussing in detail the various objections made to the instructions, we hold them substantially free from error, and the judgment will be affirmed.

**Westchester Fire Insurance Company v. John Jennings,
for Use of Solomon Langman.**

1. *DEEDS—Must Contain the Name of a Grantee.*—A deed which does not contain the name of a grantee when it is acknowledged and delivered is void, and conveys no interest whatever in the property described therein.

2. **INSURANCE—Forfeitures Not Favored.**—The right to insist upon the forfeiture of an insurance policy under a clause prohibiting changes in the title to the property insured, is *stricti juris*, and liberal intendments and enlarged construction will not be indulged in favor of such a forfeiture. The objection must be brought clearly within the forfeiting clause or it will not avail.

8. **AMENDMENTS—As to the Parties.**—It is proper to order the record to be amended so as to allow a suit to be carried on in the name of the plaintiff for the use of the real party in interest, and this without the consent of the plaintiff and regardless of the objection of the defendant.

Assumpsit, on an insurance policy. Appeal from the City Court of Elgin; the Hon. RUSSELL P. GOODWIN, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

STATEMENT OF THE CASE.

On December 19, 1892, the Oakland Home Insurance Company issued its policy to Sol. Langman, covering \$1,000 on a dwelling house in the city of Elgin, said policy to run three years and expiring December 19, 1895.

On March 9, 1893, Sol. Langman sold and conveyed the property to one B. F. Gitchell and assigned the policy to Gitchell, and afterward, on October 23, 1893, Gitchell sold and conveyed the property to Victoria Clancy, and assigned the policy to her. In January, 1894, appellant reinsured the risks of the Oakland Home Insurance Company, including the policy in suit.

Afterward, on March 9, 1894, Victoria Clancy sold and conveyed the property to John Jennings and assigned the policy to him.

At the time that Langman conveyed the property to Gitchell, the agent of the insurance company made the following indorsement on the policy, viz.: "Loss, if any, payable to Sol. Langman, mortgagee, as his interest may appear." But afterward, and on January 15, 1894, this loss payable clause was, at Langman's request, canceled, and the following indorsement was made: "Loss, if any, payable to R. M. Ireland, trustee, for the use of holders of notes secured by a trust deed, as their interest may appear." On March 6, 1896, therefore, the policy ran to John Jennings, with the above indorsement attached thereto.

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On April 22, 1894, Jennings and wife acknowledged before a notary public at Indianapolis, Indiana, the execution of a deed, dated April 2, 1894, containing a description of the property in question, but not having inserted therein the name of any grantee, the space for the name of the grantee being left entirely in blank. But attached to said deed is a paper of which the following is a copy:

CHICAGO, ILL., April 7, 1894.

N. A. Burnham is hereby authorized to fill in the names of the grantees in the deed hereto attached, and to sign my name to the transfer of the insurance policy on the property conveyed by said deed to the grantee, so filled in.

(Signed) JOHN JENNINGS.

The deed and this paper were delivered to N. A. Burnham.

No assignment of the policy was made to Burnham, nor was any notice given to the insurance company of any change in interest or ownership.

On September 4, 1894, the property was destroyed by fire. Burnham made claim upon appellant for payment of the loss, exhibited his alleged deed for the property to the company, and claimed to be the sole and unconditional owner. Upon ascertaining the facts appellant denied all liability and refused to pay the claim.

Burnham then sold his deed to Langman for \$25, and the latter procured Jennings to file proofs of loss, and upon the appellant again denying liability and refusing to pay, Jennings brought this suit to recover for the loss.

Appellant then obtained a statement from Jennings that at the time of the fire he had no interest whatever in the property destroyed, and he stipulated that the suit might be dismissed. Langman thereupon, against the objection of appellant, obtained leave from the court to so amend the record, that the suit should run in the name of Jennings for Langman's use.

A clause in the policy provided that if the interest of the insured in the ownership of the property be other than unconditional and sole, or if any change other than by the

death of the insured takes place in the interest, title or possession of the subject of the insurance by legal process or judgment or by voluntary act of the insured or otherwise, the policy should be void.

There was a waiver of jury, and trial by the court, resulting in a judgment in favor of appellee for the use of Langman for \$944.50 damages, and for costs, and appellant brings the case to this court by appeal.

BATES & HARDING, attorneys for appellant.

BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Upon the evidence in this case, which sustains the foregoing statement of facts, we think the judgment of the court below was right and must be affirmed.

The deed from Jennings and wife was a nullity and conveyed no interest whatever in the property insured. It lacked one of the essentials to a valid grant, viz., a grantee, and was therefore void. *Chase v. Palmer*, 29 Ill. 306; *Whittaker v. Miller*, 83 Ill. 381.

Even the authority to Burnham to insert the name of a grantee was never exercised, but the deed when offered in evidence was without the name of any grantee. It would seem to require no argument to show, that such a paper executed by Jennings and wife, did not divest the title of Jennings, nor deprive him of the ownership and right of possession. Burnham had no contract in relation to the property which could have been enforced in any court either at law or in equity. There was, therefore, no legal change of title or interest and Jennings could at any time have recovered possession of the property. The policy of insurance was duly assigned to him, and under the circumstances he was the proper person to make the proofs of loss and carry on the suit for the benefit of the holders of the notes secured by the trust deed. There was no error in

permitting an amendment of the record so as to allow the suit to be carried on in the name of Jennings for the use of Langman. Jennings was but the nominal plaintiff, and it would have been inequitable to allow him to dismiss the suit at the solicitation of appellant and to the injury of Langman. We think the action of the court in this behalf was entirely proper, and in accordance with well established principles of law and practice.

The defense sought to be interposed in this case is, at best but technical, and forfeitures of this character will not be enforced by the courts, unless required by the strict rules of law.

The right to insist upon the forfeiture of a policy under such a prohibitory clause as that contained in the policy under consideration, is *stricti juris*. "Liberal intendments and enlarged construction will not be indulged in favor of such forfeitures. The objection must be brought clearly within the forfeiting clause or it will not avail." *Aurora Fire Ins. Co. v. Eddy*, 55 Ill. 213; *Conn. Ins. Co. v. Spanneble*, 52 Ill. 53.

We think appellant has not shown a strict right to insist upon the forfeiture in this case, and the defense can not avail.

Finding no error in the holdings of the court upon propositions of law, and being satisfied that justice has been done, the judgment will be affirmed.

Frank P. Wiley and John B. Drake, partners as Wiley & Drake, v. National Wall Paper Co.

1. **PLEADING**—*A Plea of Avoidance Must Give Color*.—Pleadings in avoidance must give color to the opposite party, that is, give him credit for having an apparent or *prima facie* right of action, independently of the matter disclosed in the plea to destroy such apparent right.

2. **TRUSTS AND CONSPIRACIES AGAINST TRADE**—*Pleas Under the Statutes Against*.—In an action of assumpsit for wall paper sold and delivered the defendant filed pleas alleging that the plaintiff company was a trust or combine organized for the purpose of restricting trade in, and

limiting the production and increasing the price of wall paper; the pleas failed to show that the sale counted on was in furtherance of, or connected with, the unlawful combination, if any such existed, or that the sale was at unreasonable prices produced by any unlawful combination. *Held*, that the pleas did not set up a good defense.

3. **BILLS OF EXCEPTIONS**—*Must Show Facts Relied on for Reversal*.—This case was placed on “the first trial calendar” of the trial court, and a motion to strike it off, on the ground that that action was in violation of a rule of such court, was denied. The bill of exceptions did not show an exception to said ruling, nor contain any information as to the contents of the rule alleged to have been violated. *Held*, that this court must presume that the trial court decided properly.

Assumpsit, for goods sold and delivered. Appeal from the County Court of Peoria County: the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

G. T. GILLIAM, attorney for appellants.

COVEY & COVEY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was a suit to recover for a bill of wall paper, sold by Janeway & Carpender, of Chicago, a branch of the National Wall Paper Company, to appellants, amounting to \$251.11.

Appellants defended upon the ground that they never dealt with, nor purchased the goods from appellee, but that the bill of wall paper sued for was purchased from Janeway & Carpender. Appellants also filed seven special pleas, numbered from three to nine, inclusive, whereby they sought to set up a defense under the act of June 20, 1893, entitled: “Trusts and conspiracies against trade.” (Hurd’s Statutes 1893, p. 519.) The court sustained a demurrer to these seven special pleas, and appellant abided by their pleas. We think the court did right in sustaining the demurrer to these pleas.

They were pleas in avoidance, and should therefore have given color to the plaintiff, that is, have given it credit for

having an apparent or *prima facie* right of action, independently of the matter disclosed in the plea to destroy it. 1 Chitty's Pl. (6th Ed.), p. 556; Andrews' Stephen's Pleadings, 266.

The pleas under consideration did not conform to this rule and were therefore demurrable. Nor did they set up any facts from which the court could see that if proven the unlawful trust or combination existed. Again, the pleas failed to show that the sale of the goods by appellee was in furtherance of, or connected with, the unlawful combination, if any such existed.

There was no dispute that appellants purchased and received the goods, nor is it alleged or claimed that they were sold at unreasonable prices produced by any unlawful combination.

The defense appears to have been an afterthought and without merit. The amount due was admitted by appellant's letter asking an extension of the time for payment, and the only excuse offered then for non-payment was hard times and slow collections. We think the verdict and judgment for \$251.11, the amount of the bill, was right and should be affirmed. We find no error in the action of the court in giving or refusing instructions.

It is insisted that the court erred in placing the case on the first trial calendar, and refusing to strike it off upon appellant's motion, it being claimed that this action was in violation of rule ten of the court in which the cause was tried.

No exception seems to have been saved to the ruling of the court on this motion, the bill of exceptions being entirely silent on this subject. There is no evidence as to what rule ten was beyond an alleged copy included in the motion, and that not being incorporated in the bill of exceptions is not properly before us. There is no evidence to show on what the court based its action in overruling the motion, and we must presume it decided properly.

The judgment will be affirmed.

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John G. Ballance v. City of Peoria.

1. **FORMER DECISIONS—*Approved and Followed.***—The court holds that the evidence in this case discloses substantially the same state of facts as appeared in the case of *City of Peoria v. Ballance*, 61 Ill. App. 369, and that the principles announced in the opinion in that case are decisive of this.

Debt, for rent. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

MCCULLOCH & MCCULLOCH, JAMES M. RICE and M. E. BIXLER, attorneys for appellant.

W. T. IRWIN, city attorney, for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellant brought his action of debt against appellee to recover rent alleged to be due upon a lease for parts of lots 4 and 5, in Bigelow and Underhill's addition to Peoria; the premises consisting of water lots contiguous to the bridge of appellee, across the Illinois river, on Bridge street in the city of Peoria.

A jury being waived, the cause was tried by the court, who found the issues for appellee, and rendered judgment accordingly.

The suit is upon the same lease, and we think the evidence in the record discloses substantially the same state of facts as appeared in the case of *City of Peoria v. Ballance*, 61 Ill. App. 369, in which this court reversed a judgment in favor of appellant, upon the lease and evidence then in the record.

Appellant insists that the facts now appearing in the record, are essentially different to what the evidence showed them to be when the case was previously before us. He also insists that the decision in that case was made under a misapprehension of the facts.

Caldwell v. Dvorak.

A careful examination of the present record fails to satisfy us that the evidence in this case is so different to what it was upon the former trial, as to require a contrary holding to that announced in our former opinion, and we deem it unnecessary to here again recite the facts. We are satisfied with the principles announced in the opinion referred to, and if they are correct then they are decisive of the case at bar.

Much complaint is made as to the action of the court in passing upon propositions of law, but as we are of the opinion the trial court reached a correct conclusion in its final judgment, we deem it unnecessary to examine in detail the holdings upon the numerous propositions of law submitted.

The judgment of the Circuit Court will be affirmed.

F. H. Caldwell and F. C. Hemenway v. Frances Dvorak.

1. *WITNESSES—Credibility of, is for the Jury.*—The jury see the witnesses and hear them testify and are in a better position to judge as to their truthfulness than a court of appeal, and in this case the court is unable to say that they should have disregarded the testimony of appellee.

2. *INSTRUCTIONS—Should be Construed Together.*—Appellant's instructions distinctly informed the jury that "fraud may may be proved by circumstances" and the fact that this was not stated in appellee's second instruction could not have misled the jury.

Trespass, for a wrongful levy. Appeal from the Circuit Court of Rock Island County; the Hon. JOHN J. GLENN, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

JACKSON & HURST and HAROLD A. WELD, attorneys for appellants.

LOONEY & KELLY and J. T. KENWORTHY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action of trespass brought by appellee against

appellants, to recover the value of certain property levied upon and sold by appellant Hemenway, as sheriff, under an execution in favor of Caldwell, and against John Buryanek, a brother of appellee.

Buryanek being indebted to Caldwell, who is a banker, the latter sued out a writ of attachment which was levied upon the property in question, but the levy was subsequently released, after appellee had notified the sheriff that she claimed the property and demanded its possession. The claim of appellee to the property was based upon a chattel mortgage of the same, executed to her by Buryanek. Five days later, Caldwell claiming that the chattel mortgage was fraudulent, caused the property to be again levied upon under the writ of attachment. On the trial of the attachment suit, the issue as to whether the chattel mortgage was *bona fide* or not, was determined in favor of appellee, and the attachment was dissolved, but appellant Caldwell recovered a judgment against Buryanek, in the same suit, for \$2,352. An execution was issued upon this judgment, which came into the hands of Hemenway, as sheriff, and under which he levied upon and sold the property in controversy. The sheriff's return of the sale shows that the property sold for the sum of \$406.40.

Before the entry of the judgment against Buryanek, but after the release of the first levy under the attachment writ, he made a bill of sale of the property to the appellee. His claim and that of appellee is, that this bill of sale was made because the latter was about to foreclose her chattel mortgage after the first levy, under the insecurity clause in the mortgage. Appellee claims that the consideration of the chattel mortgage, which was for \$1,000, was money loaned to Buryanek out of funds which she brought with her from Bohemia when she came to this country in June, 1893.

There was a trial by jury and verdict for appellee for \$1,000, from which the court ordered a remittitur of \$400, and then, after overruling a motion for new trial, rendered judgment in her favor for \$600, and appellants appeal to this court.

The only controversy in the case is as to the *bona fide* of the chattel mortgage, because, if the mortgage was given in good faith, to secure an honest indebtedness, there would be nothing fraudulent about the bill of sale. Whether the transaction was an honest one or not was a question of fact, and if the jury believed the testimony of appellee, they could not do otherwise than find in her favor. It is insisted on the part of appellants that the testimony of appellee is so improbable, and that she has contradicted herself to such an extent on the several occasions when she has testified on this matter, that no credence should be given to her story. But the jury saw the witness and heard her testify; they had before them all the evidence which was introduced tending to show that she had made different and contradictory statements on former occasions when she had been examined upon the same subject, and yet they seem to have believed her testimony, or they could not have returned the verdict which they did. The jury were certainly in a much better position to judge as to the truthfulness of appellee than we are, and we can not say they should have disregarded her testimony, especially as it was not contradicted by any one else, but on the contrary, was corroborated by Buryanek.

We do not feel warranted in disturbing the verdict of the jury upon the questions of fact involved.

It is urged that the court erred in giving the second of appellee's instructions, for the reason, as is claimed, that it substantially tells the jury that fraud can not be proved from circumstances. We do not think the instruction is fairly open to that criticism. It does announce the well known principle that fraud is not to be presumed but must be proved by the party alleging it. As to whether the fraud may be inferred from the circumstances in evidence, or must be established by direct proofs, the instruction is wholly silent.

In the second instruction given for appellant the jury are distinctly informed that "fraud may be proved by circumstances shown by the evidence in the suit," so that the

jury could not have been misled on that subject by anything contained in appellee's second instruction, and we think there was no error in giving it. We think there was no error in refusing the twelfth instruction asked by appellants. The substance of it was given in other instructions, on behalf of both parties, and the court was not required to repeat, over and over again, the principle it contained.

Finding no error in the record, the judgment will be affirmed.

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Chicago & Alton Railroad Co. v. John Clausen.

1. **WAIVER—Of Demurrer.**—If a party pleads over after his demurrer is overruled he waives the demurrer, and the ruling thereon can not be assigned for error.

2. **SAME—By Introducing Evidence, etc.**—A motion to exclude the plaintiff's evidence from the jury is waived if the defendant introduces evidence in his own behalf and does not renew the motion at the close of all the evidence.

3. **ARREST OF JUDGMENT—After Demurrer to Declaration is Overruled.**—After judgment overruling a demurrer to a declaration, there can be no motion in arrest of judgment for any exception that might have been taken on arguing the demurrer.

4. **VARIANCE—How Presented as a Question of Law.**—Where a motion to exclude the evidence was not based upon the ground of variance, and the bill of exceptions does not show that any evidence was objected to by the appellant, because of a variance between the proofs offered and the allegations of the declaration, no question of variance arises that can be availed of in a court of appeal.

5. **NEGLIGENCE AND ORDINARY CARE—Getting off Train While it is in Motion.**—In a suit against a railroad company for injuries received by a passenger while attempting to alight from a moving train, the jury has a right to take into consideration all the circumstances appearing in evidence and from them to determine the question of negligence on the one part and due care on the other. A court of appeal can not say that it is negligence *per se* for a passenger to attempt to alight from a moving train.

6. **EVIDENCE—In Personal Injury Cases—Exhibition of Injury to the Jury.**—In a suit for personal injuries, where the question is as to the

C. & A. R. R. Co. v. Clausen.

extent of the wound or injury it is not improper to allow the plaintiff to strip his person and expose his alleged injury to the jury that they may see for themselves its nature and extent. Matters of this nature are largely in the discretion of the trial court.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

C. C. & L. F. STRAWN, attorneys for appellant.

W. H. KETCHAM and R. S. McILDUFF, attorneys for appellee.

A party who does not abide by his demurrer, but pleads over, thereby waives the objection which he raised by his demurrer and can not thereafter be heard to insist upon it, either by motion in arrest of judgment or on error. By consenting to a trial on the merits, the party who interposed the demurrer waives any benefit he might otherwise have had from his demurrer. It is an admission of the sufficiency of the pleading to which he demurred and it also comes under the rule that dilatory matters can not be interposed after pleading to the merits. 1 Shinn's Ill. Plead. and Prac., Sec. 640, p. 785, and cases cited in note 6; Walker v. Welch, 14 Ill. 277; Dunlap v. C., M. & St. P. Ry. Co., 151 Ill. 421; Ambler v. Whipple, 139 Ill. 322; Gordon v. Reynolds, 114 Ill. 123; Sterns v. Cope, 109 Ill. 340; Gradle v. Hoffman, 105 Ill. 154.

If specific objection is not made to the admission of evidence in the trial court, by demurrer to the evidence, motion for non-suit or motion to strike out, the party will be deemed to have waived his objection. A general objection on the ground of variance to the evidence offered will not be sufficient. The objection must specifically set forth the ground relied upon in order that the party offering it may avoid the variance by an amendment of his pleading or that the party raising the objection may assign the same for error in his bill of exceptions. 2 Shinn's Ill. Plead and Prac. Sec. 819, p. 1003; the same, Sec. 895, pp. 1068-71; Har-

ris v. Shebeck, 151 Ill. 287; Betting v. Hobbett, 142 Ill. 75; C. & A. R. R. Co. v. Byrum, 48 Ill. App. 41; S. C., 153 Ill. 134.

Where an objection to evidence is such that it might be obviated by further proof or amendment and the objection is not urged at the time the evidence is offered, such objection will be deemed to have been waived. This is because the law does not permit a party to sit quietly by and let incompetent evidence be given to the jury without objection and then urge the same as error in a court of review. A case will not be reversed for objectionable evidence which might have been rendered unobjectionable had the opposite party not negligently failed to offer an objection. It is too late to object for the first time in a court of review. 2 Shinn's Ill. Plead. and Prac., Sec. 895, p. 1071; Richelieu Hotel Co. v. Mil. Encamp. Co., 140 Ill. 259; Lake Shore & M. S. Ry. Co. v. Ward, 135 Ill. 516; St. Clair County Benevolent Society v. Fietsam, 97 Ill. 474; City of Chicago v. Moore, 139 Ill. 209; Murchie v. Peck Bros. & Co., 160 Ill. 178; Chicago City Ry. Co. v. Van Vleck, 143 Ill. 483.

If the defendant moves, at the close of the plaintiff's evidence, that a verdict be directed and the motion is overruled, after which the defendant introduces evidence in defense and thereafter fails to renew his motion or ask that the evidence be excluded from the jury, the question whether, as a matter of law, there is evidence to establish the plaintiff's cause, will not arise on the record, for the plaintiff's case may have been strengthened by the evidence of the defendant and that of the plaintiff in rebuttal. 2 Shinn's Ill. Plead. and Prac., Sec. 922, p. 1091; Chicago City Ry. Co. v. Van Vleck, *supra*; Harris v. Shebek, *supra*.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee against appellant to recover damages for injuries alleged to have been received by him, while attempting to alight from one of appellant's passenger trains on which he had been

riding at Gardner, in this State, in the forenoon of November 18, 1895.

The declaration originally contained three counts, but appellee subsequently filed four additional counts. A demurrer was sustained by the court to all these counts, except the first count of the original declaration.

Appellee then filed five amended counts, to which appellant interposed a demurrer, and that being overruled by the court, the plea of not guilty was entered, and upon the issues thus joined, there was a trial by jury, resulting in a verdict in favor of appellee for \$3,000. A motion for new trial being overruled, there was judgment on the verdict.

A considerable portion of the argument of counsel for appellant is devoted to the proposition that the court erred in overruling the demurrer to the amended count. It is an elementary rule, supported by an abundance of authority, that by pleading over, a party will waive the right to insist upon his demurrer. *Walker v. Welch*, 14 Ill. 277; *Dunlop v. C., M. & St. P. Ry. Co.*, 151 Ill. 421; *Gordon v. Reynolds*, 114 Ill. 123; *Ambler v. Whipple*, 139 Ill. 322; *Gardner v. Haynie*, 42 Ill. 292; *City of Rock Falls v. Wells*, 65 Ill. App. 560.

Nor, in such a state of the record can the defendant prevail on a motion in arrest of judgment for any exception that might have been taken on arguing the demurrer. *Ind. Order of Mutual Aid v. Paine*, 122 Ill. 628, citing 2 *Tidd's Prac.* 825; *Am. Express Co. v. Pinckney*, 29 Ill. 405; *Quincy Coal Co. v. Hood, Adm'r*, 77 Ill. 68.

At the close of plaintiff's evidence appellant entered a motion to exclude the evidence and direct a verdict for defendant. The motion was overruled by the court, appellant excepted, and this action of the court is assigned for error.

But by introducing evidence in its own behalf, and not renewing the motion at the close of all the evidence, appellant waived its right to complain of this action on the part of the court. *City of Rock Falls v. Wells*, 65 Ill. App. 557.

One of appellant's assignments of error is, that there was a variance between the declaration and proofs. But, the motion to exclude the evidence, was not based upon the ground of variance, nor does the bill of exceptions show that any evidence was objected to by appellant because of a variance between the proof offered and the allegations of the declaration. We think therefore that no question of variance arises on the record that can be availed of in this court. *Harris v. Shebeck*, 151 Ill. 287.

The principal difficulty we have had in this case, has been upon the questions of fact, it being strongly insisted by appellant, that the evidence fails to show negligence on its part, and that it does show such a want of due care on the part of appellee as to preclude his right of recovery. To these questions we have given much care, and have reached the conclusion that it is not our duty to disturb the finding of the jury upon these points. The verdict is certainly not so manifestly against the weight of the evidence as to strike the mind at first blush as being clearly wrong. There was evidence from which the jury may have been warranted in believing that the appellant negligently started its train without giving appellee sufficient time to alight.

The evidence shows that the train did not stop longer than thirty seconds, or from that to one minute, according to the various estimates of the witnesses. Appellee appears to have reached the door of the car in which he was riding at about the time the train stopped. Passengers immediately began to get on the car, coming up the steps at which appellee would naturally get off, and almost at the same instant that these passengers got on, the train started, and after it got under way appellee attempted to get off, and in doing so, received the injuries complained of. That he was delayed for a short time, by these passengers getting on the train, admits of no doubt. Was the act of trying to get off the train after it started, such negligence on his part as precludes a right of recovery? This was a question of fact for the jury. It was for them to say whether an ordinarily prudent person, under similar circumstances, would have

been likely to pursue the same course. The same thing has no doubt been done thousands of times without accident; we can not say an ordinarily prudent person, under similar circumstances, would not have done the same thing, rather than be carried by his place of destination. The jury had the right to take into consideration all the circumstances appearing in the evidence, including the age and experience of appellee, the length of time the train stopped, the speed at which the train was going when appellee got off, and from all these things determine the question of negligence on the one part and due care on the other.

We do not agree with counsel for appellant that it is negligence *per se* for a passenger to attempt to alight from a moving train. It might or might not be dangerous, depending on the circumstances. As was said by Mr. Chief Justice Lawrence in the case of I. C. R. R. Co. v. Able, 59 Ill. 131. "Cases might occur, however, in which a reasonable opportunity to alight has not been given to a passenger, and when he attempts to do so after the train has resumed its motion, but before the motion has become at all rapid, and the stepping from the train would not seem dangerous to a man of ordinary prudence and judgment, and nevertheless bodily injury follows, in such cases the passenger would be entitled to recover damages for the injury, because the railroad company has committed a flagrant breach of duty, and the passenger is chargeable with no appreciable negligence." So in the case at bar, if it be true the train did not stop long enough to give appellee a reasonable opportunity to alight, under all the circumstances of the case, we can not say his attempting to get off the train after it resumed its motion, was such negligence as prevents a recovery. On the whole we do not feel warranted in setting aside the verdict on these grounds.

One of the injuries to appellee was a rupture, alleged to have been received by him in consequence of his fall when he attempted to alight from the train. On the trial, the court, over appellant's objection, permitted appellee to strip his person and expose this alleged rupture to the jury, and this

is complained of as error. Matters of this nature are largely within the discretion of the trial court. When the question is as to the extent of the wound or injury, it is a common practice to exhibit it to the jury that they may see for themselves its nature and extent. *Springer v. City of Chicago*, 135 Ill. 563; *City of Lanark v. Dougherty*, 153 Ill. 165.

We think there was no error in this action of the court.

It is next insisted that the damages are excessive, and the case is argued as if the rupture were the only injury received. But according to the plaintiff's testimony, he was otherwise hurt, in his shoulder, back, and right arm. The jury heard him testify and it is peculiarly within their province to ascertain and fix the compensation he should receive for his injuries. The amount is not so large as to bear evidence of its being the result of passion and prejudice, and we do not think the judgment should be reversed because the damages are excessive.

We do not find any reversible error in the instructions given on behalf of appellee, and those which the court declined to give at the instance of appellant were properly refused.

Finding no serious error in the record, the judgment will be affirmed.

Hugo Schumacher et al., Assignees, v. Edward P. Allis Company.

1. *CORPORATIONS—Act Done by Officers of a Corporation as Officers of Another Corporation.*—Persons acting as the officers of two corporations, operated the two as if they were but one company, and as officers of one company, contracted for machinery to be placed and used in the plant of the other, and at a later date as officers of the latter company gave its notes for the purchase price of the machinery. *Held*, that the authority of the company making the purchase to act for the other company could not be questioned for the purpose of avoiding a clause of the contract authorizing the removal of the machinery in case of non-payment.

Schumacher v. Edward P. Allis Co.

2. *PAYMENT—When a Note for the Amount Due Will Amount to.*—Taking a note, either of the debtor or of a third person, for a pre-existing debt is not a payment of the debt unless it be expressly agreed that the note is taken in absolute payment, or unless the creditor has parted with the note so as to subject the debtor to double payment.

8. *SAME—Burden of Proof as to, When a Note is Given for the Debt.*—Except in a case where the evidence raises a positive inference of discharge the burden of proof is on the debtor, to show that a note for a pre-existing debt was both given and received as absolute payment.

4. *VOLUNTARY ASSIGNMENTS—Title of the Assignee.*—Under a general assignment, the assignee takes as a mere volunteer, and the property assigned is subject to the same defects of title, equities and liens as when in the hands of the assignor.

5. *SAME—Duty of the Assignee as to the Rights of Mortgagees.*—On an appeal by an assignee, a court of appeal will not interfere with a finding of the trial court in favor of a person claiming property in the hands of such assignee on account of the alleged rights of a mortgagee. It is not for the assignee to set up for the mortgagee rights which he does choose to assert for himself.

6. *SALES—Clause Giving Vendor Right to Seize Property for Non-payment, Valid.*—A clause in contract of sale of machinery giving the vendor the right to remove the machinery in case of non-payment is legal and binding between the parties to the contract even though the machinery be attached to the real estate.

7. *FIXTURES—Whether Real or Personal Property—Agreements.*—Things clearly personal in their nature may retain their character of personality by the express agreement of the parties, although attached to the realty in such a manner that without agreement they would lose that character, provided they are so attached that they may be removed without material injury to the articles themselves or to the freehold.

8. *SAME—Whether Real or Personal Property—Rights of Mortgagees.*—If chattels are sold to an owner of real estate on an agreement, that their character as personal property is not to be changed, and that the title is to remain in the vendor until the purchase money is paid, a prior mortgagee of the land can not claim them, although subsequently annexed to the freehold, if they can be removed without material damage to the real estate or to the chattels themselves.

Petition, in assignment proceedings. Appeal from the County Court of La Salle County; the Hon. HENRY W. JOHNSON, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

CLARENCE GRIGGS, attorney for appellants.

BREWER & STRAWN, attorneys for appellee.

The giving of a negotiable note in consideration of a simple contract debt does not discharge the contract on which the debt was founded, unless it appears that it was agreed that the note should be taken in absolute payment, or that the creditor has so parted with the note as to subject the debtor to double payment. *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598, and authorities collected on page 600; *Willhelm v. Schmidt*, 84 Ill. 183; *Walsh v. Lennon*, 98 Ill. 27; *Cheltenham Stone and Gravel Company v. Gates Iron Works*, 124 Ill. 623.

Except where the evidence raises a positive inference of discharge, the burden of proof is upon the debtor to show that the note was both given and received as an absolute payment. *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598; *Johnson v. Weed*, 9 Johns. 310; *Mitchell v. Hockett*, 25 Cal. 538; *Merrick v. Boury*, 4 Ohio St. 60; *Haines v. Pearce*, 41 Md. 221; *Glenn v. Smith*, 2 Gill and J. 493; *McMurray v. Taylor*, 30 Mo. 263.

With great care should a court reach the conclusion that the evidence raises an inference of discharge when the creditor would thereby lose some security which he held before taking the note. *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598; *Bond v. Liverpool & London Globe Ins. Co.*, 106 Ill. 654; 3 *Randolph on Commercial Paper*, Secs. 1513, 1518; 2 *Parsons on Notes and Bills*, 205; 2 *Daniel on Neg. Inst.*, Sec. 1267.

The doctrine of conditional sales has been repeatedly recognized in this State. *Hooven, etc., Co. v. Burdette, Assignee*, 153 Ill. 672; *Murch v. Wright*, 46 Ill. 487; *Latham v. Sumner*, 89 Ill. 233; *Fairbanks v. Malloy*, 16 Ill. App. 277; *Fleury v. Tufts*, 25 Ill. App. 101; *Jordan v. Easter*, 2 Ill. App. 73; *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598.

Heavy machinery may retain its character as personal property by agreement of the parties, when otherwise it would become a part of the realty. *Hooven, etc., Co. v. Burdette, Assignee*, 153 Ill. 672; *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598; *Ellison v. Salem Coal*

Schumacher v. Edward P. Allis Co.

and Mining Co., 43 Ill. App. 120; *Sword v. Low*, 122 Ill. 487; *Lake Superior, etc., Co. v. McCann*, 86 Mich. 109; *Manwaring v. Jenison*, 61 Mich. 117; *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. Rep. 19; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211; S. C., 59 Minn. 532; *Page v. Edwards*, 64 Vt. 124; *Marshall v. Bachelдор*, 47 Kan. 442.

When the premises were mortgaged, before the machinery was put in under a conditional contract, the lien of the contract takes precedence of that of the mortgage, as the machinery was no part of the security taken. *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598; *Ellison v. Salem Coal and Mining Co.*, 43 Ill. App. 120; *Sword v. Low*, 122 Ill. 489; *Tift v. Horton*, 53 N. Y. 377; *Page v. Edwards*, 64 Vt. 124; *Manwaring v. Jenison*, 61 Mich. 117; *Merchants' Nat. Bank v. Stanton*, 55 Minn. 211.

Under a general assignment the assignee takes the title as a volunteer, and subject to all liens upon the property to which it was subject in the hands of the assignor. *Hooven, etc., Co. v. Burdette, Assignee*, 153 Ill. 672; *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598; *O'Hara v. Jones*, 46 Ill. 289; *Davis, Cory & Co. v. Chicago Dock Co.*, 129 Ill. 180; *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Jordan v. Easter*, 2 Ill. App. 73, 79; *Paddock v. Stout*, 121 Ill. 571.

A conditional contract will be enforced as against an assignee, there being no judgment or attaching creditors or *bona fide* purchasers without notice. *Hercules Iron Works v. Hummer, Assignee*, 49 Ill. App. 598; *Union Trust Co. v. Trumbull*, 137 Ill. 146; *Murch v. Wright*, 46 Ill. 487; *Hooven, etc., Co. v. Burdette, Assignee*, 153 Ill. 672; *Thomas Mfg. Co. v. Huff*, 62 Mo. App. 124.

When the officers and directors of two corporations are alike, each has notice of the contracts of the other. *New Chester Water Co. v. Holly Mfg. Co.*, 53 Fed. R. 19, 27; *Walker v. Grand Rapids Flouring Mill Co.*, 70 Wis. 92.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This cause arose upon a petition filed by appellee for leave

to remove certain machinery from premises in the possession of appellants as assignees of the Illinois River Paper Company, The Marseilles Land and Water Power Company and Ferdinand Schumacher.

Upon a hearing in the County Court, the prayer of the petition was granted and leave given to remove the machinery in question, and from such order appellants prosecute an appeal to this court.

From the record we gather the following facts: Some time prior to the year 1895, one Ferdinand Schumacher, a capitalist of Akron, Ohio, became the purchaser of the property and capital stock of the Marseilles Land and Water Power Company, of Marseilles, Illinois, thereby becoming the owner of the water power at that place and also a large amount of real estate, paper mills and other mill property operated by water power at Marseilles. He also acquired the property and capital stock of the Illinois River Paper Company, another corporation located at Marseilles, and thereby became the owner of a large paper mill, which he afterward completed and equipped as a straw board plant, having a large capacity of production.

Hugo Schumacher, a nephew of said Ferdinand, and one of the appellants, appears to have been the confidential agent of the latter at Akron, O., and Richard F. Knott was the superintendent of the works at Marseilles. Ferdinand Schumacher was president and Hugo Schumacher was secretary of both said corporations, viz., the Illinois River Paper Company and the Marseilles Land and Water Power Company, during the years 1895 and 1896. All the business that was done by both companies appears to have been transacted in the name of the Marseilles Land and Water Power Company, which purchased the supplies, manufactured the product and received the proceeds. But one set of books was kept, and only one office was maintained, and no lease of its property appears to have been given by the Paper Company to the Land and Water Power Company.

On July 17, 1895, Ferdinand Schumacher borrowed, in New York City, \$100,000, for which he executed his three

promissory notes, each for one-third of the amount, and secured them by a mortgage deed of that date to Albert O. Beebe, upon the plant of the Illinois River Paper Company, at Marseilles. This mortgage was filed for record August 19, 1895.

In November, 1895, upon the suggestion of Mr. Knott, the superintendent, it was determined to put into the plant of the Illinois River Paper Company, a steam engine, boiler and machinery for use in operating the works in case of a failure in the water power, and in pursuance of this determination a contract was entered into between the Marseilles Land and Water Power Company and appellee, whereby the latter was to sell and deliver to the former, a Corliss engine and condenser, with the necessary equipment, according to specifications contained in the contract, and upon the conditions therein named, for the sum of \$4,874, payable one-half cash on shipment, balance sixty days after shipment.

The contract also contained the following provision: "The title and right of possession to the machinery we furnish remains in the Edward P. Allis Company until the same has been fully paid for in cash."

On behalf of the Marseilles Land and Water Power Company, this contract was executed by Ferdinand Schumacher, its president. In pursuance of this contract, the engine and condenser were delivered and accepted December 28, 1895, and the balance wheel, on February 8, 1896, Mr. Knott, as such superintendent, also purchased of appellee other apparatus to be used in the plant, at the agreed price of \$1,068, one-half to be paid in cash and one-half in sixty days. But this was a matter outside of the contract for the purchase of the engine.

On January 13, 1896, appellee telegraphed to Hugo Schumacher for the amount then due on the engine, condenser and wheel. The next day Ferdinand Schumacher replied that they did not have the funds at present, but he sent a note for \$2,000, due in sixty days from January 13th, and expressed the hope that appellee might be able to get it cashed. This note not being paid when due, the Illinois

River Paper Company, by Hugo Schumacher, its secretary and treasurer, sent a new note for \$2,000 due in sixty days and also inclosed a check for \$21 for interest. The old note was returned to Ferdinand Schumacher.

On March 5, 1896, Ferdinand Schumacher sent a letter to appellee inclosing a note for \$3,040.33, dated March 5, 1896 and due in three months after date. This note included a part of the purchase price of the other apparatus bought of appellee and not included in the original contract. Nothing has ever been paid on either of these notes, nor upon the contract for the engine, except the sum of \$437, paid by check February 10, 1896.

All the balance of the contract price for said machinery is still unpaid.

On May 9, 1896, the Illinois River Paper Company, the Marseilles Land and Water Power Company and said Ferdinand Schumacher each made a general assignment to appellants for the benefit of creditors.

On May 20, 1896, appellee filed its petition in the County Court of La Salle County, where the assignment proceedings were pending, for leave to remove the said engine and machinery in question. The two companies interested were made parties defendant, as well as Albert O. Beebe, the mortgagee. The only service of notice upon Beebe was by registered letter, which informed him of the contents of the petition and its prayer, and requested him to appear if he desired to contest the claims of the petitioner. We think the evidence shows that Beebe received this notice and also that the counsel for the corporation interested in the loan of \$100,000, replied that he would give the matter his attention. Appellants, as assignees of the two companies interested, appeared and defended against the petition, but neither Beebe, nor any one interested in the loan, made any defense against the claims of appellee, and they are in no way represented in this court, the only parties complaining of the action of the court below being appellants as assignees of the Illinois River Paper Company and the Marseilles Land and Water Power Company. The court entered an order granting the prayer of the petition.

There are four specific assignments, of error, which we will proceed to dispose of in their order.

1. "The court erred in finding that the Marseilles Land and Water Power Company purchased said machinery as the agent of the Illinois River Paper Company."

Whether the one company can be considered as the agent of the other or not, it is quite clear the same persons were the officers of both concerns, running and operating the two as if but one company. Ferdinand Schumacher, as president of the Marseilles Land and Water Power Company, contracted for the machinery to be placed and used in the plant of the Illinois River Paper Company, of which he was also the president, and he stood by and saw it put in the plant of the latter company, without objection, to be used and operated, presumably for the benefit of both companies. But not only was the machinery set up in the plant of the Illinois River Paper Company with the knowledge and consent of its officers, but it gave its notes for the purchase price thereof, one being for \$2,000, dated March 16, 1896, which was given in extension of the former note for same amount, and one dated March 5, 1896, which was for \$3,040.32, and included the balance of the purchase price for the machinery. Under these circumstances we think the assignees ought not to be permitted to raise the question of agency so as to avoid the contract for the removal of the machinery in case of non-payment. For all practical purposes, so far as running and operating the plants were concerned, the Marseilles Land and Water Power Company was the Illinois River Paper Company. We hold that this assignment of error is not well taken. (See 53 Fed. Rep. 19.)

2. "The court erred in finding that no payment for said machinery had been made excepting the sum of \$437, paid February 10, 1896, and the sum of \$21, March 16, 1896."

It is not pretended that any other payments were made in cash, than those mentioned, but it is argued that the circumstances show the notes given were received as absolute payment. We are unable to find in the evidence any sup-

port for this contention. When appellee asked for cash, according to the terms of the contract, notes were sent to it as the mere voluntary act of Ferdinand Schumacher, because he had no funds with which to pay the cash. Appellee never asked for the notes, and so far as the record shows, never agreed to accept them in payment.

In *Hercules Iron Works v. Hammer*, 49 Ill. App. 598, we held that, taking a note either of the debtor or of a third person, for a pre-existing debt is not payment, unless it be expressly agreed to take the note in absolute payment, or unless the creditor has parted with the note, so as to subject the debtor to double payment. And that except in a case where the evidence raises a positive inference of discharge, the burden of proof is on the debtor, to show that the note was both given and received as absolute payment. Many authorities were given in support of these propositions, and we are satisfied of their correctness. Hence, we are of the opinion that, under the evidence, the court held correctly upon the question of payment.

3. "The court erred in finding that the machinery was not subject to the lien of the mortgage of Albert O. Beebe."

We have serious doubts as to the right of appellants to be heard on this proposition. They possess only such rights as were given them by the assignment. They are mere volunteers, and the property assigned to them is subject to the same defects in title, equities and liens as when in the hands of the assignor. *Hercules Iron Works v. Hammer*, *supra*, and cases there cited.

When the property of the Illinois River Paper Company was assigned to appellants, it was subject to the lien of the Beebe mortgage and to the equities of appellee, and we can not see how they are legally interested in the question as to which has the superior equity.

If the court below had jurisdiction to determine Beebe's rights, and he did not choose to appeal from the order, he would be bound by it, while, on the other hand, if the court had no jurisdiction to adjudicate his rights, they remain unaffected, and it is not for appellants to set up rights for him which he does not choose to assert for himself.

Whether or not he had legal notice of the proceeding, he certainly had actual notice, and thus far has set up no claim in opposition to that of appellee. From anything that appears, he may be entirely content with the action of the court in authorizing the removal of the machinery.

But even if there were no question of that sort in the case, and were Beebe himself defending against the right to remove the machinery, we think, under the evidence and the authorities, he could not succeed in defeating the claim of appellee to a right of removal. That the contract giving the right to remove the machinery in case of non-payment was legal and binding between the parties, can not be questioned. The cases are numerous in which such contracts have been upheld. *Hercules Iron Works v. Hammer, supra*; *Ellison v. Salem Coal & Mining Co.*, 43 Ill. App. 120.

In the case of *Sword v. Law*, 122 Ill. 487, the doctrine is fully recognized, "that things clearly personal in their nature may retain their character of personalty by the express agreement of the parties, although attached to the realty in such manner as that, without such agreement, they would lose that character, provided they are so attached that they may be removed without material injury to the article itself or to the freehold."

It has also been held that when chattels are sold to the owner of the soil on an agreement that their character as personal property is not to be changed, and a chattel mortgage is taken thereon to secure the purchase money, a prior mortgagee of the land can not claim them, although subsequently annexed to the freehold, if they could be removed without doing material damage to the real estate or to the chattels themselves. *Tift v. Horton*, 53 N. Y. 377; *Voorhis v. McGinnis*, 48 N. Y. 278; *Ellison v. Salem Coal & Mining Co.*, 43 Ill. App. 120.

Many other authorities might be cited to the same effect. We do not think the cases cited by counsel for appellants in support of a contrary doctrine are in point. In the absence of an agreement to the contrary, there is no doubt

that the machinery in question, attached to the real estate as it was, as between mortgagor and mortgagee, or grantor and grantee, would be held to pass as a part of the realty, but the agreement being legal and binding fixed the character of the property, and unless a removal would work injury to the freehold in consequence of its removal, injury to some substantial and material extent, we can perceive no equitable reason why the mortgagee should be permitted to defeat the intention of the parties. His loan was made upon the plant as it then existed, operated by water power, and he will retain all the security he had for the money he advanced, unless the removal of the machinery would work appreciable injury to the freehold.

Without going into a detailed discussion of the manner in which the engine and machinery were set up in the plant, we will content ourselves with saying the evidence does not satisfy us that any material injury will be done to the real estate by permitting the machinery to be removed. No damage need be done which can not be repaired at a comparatively trifling cost. We think the court did not err in finding that the machinery was not subject to the lien of the Beebe mortgage.

The fourth assignment of error is "that the court erred in ordering that unless the defendants or some of them pay, or cause to be paid to petitioner within six months, said sum of \$4,416 with interest, petitioner might go upon the premises and remove the machinery."

What we have already said substantially disposes of this question. If the court was right in its other findings, and we have seen that it was, then it logically followed that appellee was entitled to the order made, or one giving it the same rights. The six months' time given was certainly as liberal as could reasonably be asked, and we think the order was properly made.

The point is made by appellants that appellee lost its right to remove under the contract, by commingling its privileged claim with the claim for machinery furnished outside of the contract, and the case of Union Trust Co. v.

Chicago Great Western Ry. Co. v. Kenyon.

Trumbull, 137 Ill. 146, is relied upon to support this contention. We think the authority cited is not in point. The facts of the two cases are entirely dissimilar. Here there was no commingling of claims. When demand was made for payment, it was for the separate items due on each account, and there was no commingling on the part of appellee. It is true that Ferdinand Schumacher sent a note which included both accounts, but this was entirely unauthorized and unsolicited. The principle upon which a right may be lost by reason of a commingling or confusion of goods or claims is, that the identity of the subject of the lien is lost. But here there is no question as to the identification of the engine and machinery which appellee claims the right to remove, and hence the principle has no application. We think this point is not well taken.

Finding no error in the record, the order of the County Court will be affirmed.

Chicago Great Western Railway Company v. John A. Kenyon, Adm'r.

1. **NEGLIGENCE**—*Allowing a Railroad Car to Obstruct a Street Crossing.*—Leaving a box car in such a position as to partially obstruct a public highway crossing for a period of five minutes, by a freight engine engaged in switching, is not such an act, in and of itself, as to constitute negligence, and render the company liable for injuries sustained by one who undertakes to pass, and in doing so is hurt by reason of his horse becoming frightened at the car.

Trespass on the Case—Death from negligent act. Appeal from the Circuit Court of Kane County; the Hon. HENRY B. WILLIS, Judge, presiding. Heard in this court at the December term, 1896. Reversed without remanding. Opinion filed June 26, 1897.

H. E. GARDNER and T. E. RYAN, attorneys for appellant.

OSCAR JONES and BOTSFORD, WAYNE & BOTSFORD, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

This was an action on the case brought by appellee as adminisitrator of the estate of his daughter, Adelia Kenyon, deceased, who died from injuries alleged to have been caused by the negligence of appellant.

There was a trial by jury and verdict for appellee for \$685. The court overruled a motion for new trial and entered judgment on the verdict.

There are a number of assignments of error, but the principal one is, that the verdict is against the law and the evidence. It is earnestly contended by counsel for appellant that upon the facts appearing in the evidence there can be no recovery.

As we gather the facts from the record, the circumstances under which the deceased received the injuries which caused her death, were substantially as follows:

On August 6, 1895, the deceased, a girl about fourteen years of age, together with her grandmother, Mrs. Kenyon, and her aunt, Mrs. Dove, with a borrowed horse and buggy, were driving from St. Charles, in said Kane county, to the camp meeting grounds about three miles west of that place. Near certain malleable iron works the highway crosses appellant's railroad, where there are two side tracks connected by switches. The accident happened between switch "one" and switch "two," a little northerly from the traveled way. As these three persons (two grown people and a girl of fourteen years,) approached the crossing or intersection of the highway and all the tracks, all seated in a single buggy, there stood upon the track known as switch No. 2 a box car, which projected partially into the traveled portion of the highway, and thus to some extent obstructed the crossing, leaving only a space of about eight feet of the highway available for passing the car. Mrs. Dove, who was driving, started the horse forward in an attempt to pass the car, but when they got directly opposite the car the horse "shied" and the heavily laden buggy was overturned into a ditch or depression north of

the car, and all of the party were more or less hurt, the girl so seriously that she died the day following.

It appears from the evidence that the box car in question had been shunted or "kicked" back upon this crossing, not to exceed five minutes before the accident, by a freight engine which was then engaged in switching in the yards and setting out cars.

The declaration contained but one count, and the negligence charged is, the leaving this box car in such a position upon the highway as to frighten horses of ordinary gentleness, and whereby the horse drawing the buggy in which deceased was riding, became and was frightened, and shied away therefrom, overturning the carriage and producing the injury which caused her death. The declaration contains no charge of any negligence on the part of appellant as to the construction of the crossing, or the approaches thereto. The question is thus presented, whether the fact alone, of leaving a box car in such a position as to partially obstruct a public highway crossing for a period of five minutes, by a freight engine thus engaged in switching in the yards, taking in and setting out cars, is such an act, in and of itself, as to constitute negligence and render the railroad company liable for injuries sustained by one who undertakes to pass by it, and in doing so gets hurt by reason of his horse becoming frightened at the car.

It is to be observed that there is nothing in the evidence to show that there was anything unusual in the appearance of the car, and as it was standing still it could have no greater tendency to produce a mental disturbance in a horse than any other object of like dimensions. *Harrigan v. C. & I. R. R. Co.*, 53 Ill. App. 344.

There is nothing in the sight of an ordinary box car standing still, which is more likely to cause fright in an ordinarily gentle horse, than in a dozen other things of common and general use on our streets, and in public places every day. A street car, a steam threshing machine, or a fire engine, might frighten some horses even when standing still, and yet they are not regarded as nuisances *per se*, nor

dangerous to have in common use, if handled with due care.

The particular act complained of as negligence, was the fact of leaving at and upon the highway crossing a vehicle or article, which would naturally frighten horses of ordinary gentleness. In fact the right of action was based upon the assumption that the car there standing was a thing which would naturally scare usually gentle horses. We are not prepared to yield our assent to such a proposition. In the business of the present day, the transportation of goods and passengers by railroad, is just as essential and necessary as the transportation of persons in vehicles drawn by horses, and the courts must recognize the necessity for the use of locomotives and cars, and the switching at stations, having due regard, of course, to the rights of the public in the use of the highways intersected by railroads. We hold therefore that the mere fact, standing alone, that appellant placed this box car upon the track, even though it partially obstructed the highway, was not actionable negligence unless permitted to remain there for an unreasonable length of time, and not even then upon the ground that it was an object naturally calculated to frighten ordinarily gentle horses.

In this case however the proofs show, the car had not, at the time of the accident, obstructed the crossing for an unreasonable length of time. As we have seen, it had not been there to exceed five minutes.

The statute upon this subject, which was in force at the time of the accident, provides as follows: "No railroad company shall obstruct any public highway by stopping any train upon or by leaving any car or locomotive standing on its tracks where the same intersects or crosses such public highway, except for the purpose of receiving or discharging passengers or freight, or for taking in or setting out cars, or to receive necessary fuel or water and in no case to exceed ten minutes for each train, car or locomotive engine." Hurd's Stat., 1895, p. 1202, Sec. 14.

The legislature recognize the necessity of obstructing

highway crossings in the business of operating railroads, and it has seen fit to allow such obstructions for a period of ten minutes, in the necessary handling of trains, and the taking in and setting out cars. In view of this statute, and of the fact that the car in question had just been set out by an engine then engaged in setting out and taking in cars, it must be held that the highway crossing had not been obstructed for an unreasonable length of time. It is argued by counsel for appellee, that because there was room on either side of the crossing for the car to stand, it was therefore negligence to permit it to obstruct the crossing. We think it would be unreasonable to so hold. In the switching of cars, they are frequently "kicked" or shunted upon a side track, and go only so far as their momentum will propel them, and where the intention is, as it was in this case, to go back for the car shortly after, and not leave it there for an indefinite time, it is not negligence unless the car obstructs the crossing beyond the time allowed by the statute.

On a careful consideration of the whole case, we are constrained to hold that the charge of negligence against appellant has not been established. Unfortunate as was the accident, we think appellant is not to blame for it. The horse which Mrs. Dove was driving was young and just taken out of the pasture. We think the evidence shows she was warned against trying to drive it near the cars. Nevertheless, although she could see the obstruction and the difficulty in passing the car, and the question as to whether they could go by the car or not was a subject of discussion by the persons in the buggy, she undertook the risk, with the consequence that the horse became frightened, overturned the carriage in which they were riding and caused the injury. Had they waited a very few minutes the car would have been removed and they could have passed in safety. By the reasonable use of her eyesight, we think Mrs. Dove could have seen the engine switching in the yard, and she should have waited a reasonable time at least to see whether the obstruction would be removed before attempting to cross.

But, holding as we do, that the charge of negligence against appellant is not made out it is unnecessary to discuss the question as to the alleged contributory negligence of Mrs. Dove, in whose care the intestate was riding at the time of the accident, nor any of the other questions raised in the argument.

We are of the opinion there was no cause of action against appellant, and the motion to direct a verdict in its favor should have been sustained.

The judgment will be reversed, but as in our view of the case there can be no recovery, it will not be remanded.

Finding of fact to be made a part of the judgment:

We find as a question of fact that the deceased did not come to her death by reason of any fault, carelessness or negligence on the part of appellant.

Anna K. Chase v. George Chase.

1. *INFANTS—Power of a Court of Chancery as to the Custody of.*—The power of a court of chancery as to the custody of the children of divorced parents is not exhausted by the entry of the original order in the divorce suit, but is continuing for the purpose at any time, of making such alterations thereof as shall appear to the chancellor, in the exercise of a sound discretion, reasonable and proper.

2. *SAME—Removal From the State of Wards of the Court not Favored.*—The custody of an infant being in dispute, the mother admitted an intention to take him out of the State and beyond the jurisdiction of the court, where his father and a brother and sister would have no opportunity to visit or associate with him. *Held*, that this was against the policy of the law and ought not to be permitted.

Petition, asking for the custody of children. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the December term, 1896. *Affirmed*, Opinion filed June 26, 1897.

SETH F. CREWS, attorney for appellant.

SAMUEL P. HALL, attorney for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

On November 13, 1889, appellee, in the Circuit Court of La Salle County, obtained a decree of divorce from appellant on the ground of desertion. The parties had three children, and by the terms of the decree, the care and custody of the two older ones was given to appellee, the father, and that of the youngest one, Hugh Merrill Chase, then a boy of about six years old, was given to appellant, the mother. The decree also awarded to appellant \$20 per month for the support and maintenance of the child, to be paid by appellee.

Appellant having remarried and being about to leave the State of Illinois with her husband and the child in question, to reside in the State of Iowa, appellee filed a petition in the Circuit Court of La Salle County, setting up the facts, and praying a modification of the decree so as to give him the custody of the boy, Hugh Merrill Chase, and relieving him from the payment of the \$20 per month required by the original decree.

Appellee answered the petition, admitting the remarriage and the intention to remove to Iowa with her husband and the child, but denying that appellee was a proper person to have the care and custody of said Hugh Merrill Chase.

A hearing was had before the court, and a supplemental decree entered which provided that appellant should not take the boy beyond the jurisdiction of the court. The court finds in the decree that the interest of the child will be best conserved by living where he can have daily social contact with his brother and sister, and then orders that appellee George Chase be given the custody of the child until the further order of the court.

From the supplemental decree appellant prosecutes her appeal to this court.

The only legal question presented is, as to the power of the court, at a subsequent term to that at which the original decree was entered, to modify or change its terms, it being insisted that said original decree was binding upon the

parties, conclusive and final. Authorities are cited in support of a proposition that a final decree in chancery, cannot be opened, altered or modified, after the expiration of the term at which it is entered, in the absence of fraud, and that if erroneous, the only remedy is by writ of error or appeal.

We think these authorities have no application to the case at bar.

Our statute on divorces (Chap. 40, Sec. 18), provides that "When a divorce shall be decreed the court may make such order touching the alimony and maintenance of the wife, the care, custody and support of the children, or any of them, as from the circumstances of the parties and the nature of the case shall be fit, reasonable and just; * * * and the court may, on application from time to time, make such alterations in the allowance of alimony and maintenance and the care, custody and support of the children, as shall appear reasonable and proper." 2 Starr & Curtis Stat. 892.

Under this statute it has been held that the power over the subject-matter of alimony is not exhausted by the entry of the original order, but is continuing for the purpose, at any time of making such alterations thereof as shall appear to the chancellor, in the exercise of a sound judicial discretion, reasonable and proper. *Cole v. Cole*, 142 Ill. 19; *Foote v. Foote*, 22 Id. 425; *Stillman v. Stillman*, 99 Id. 196; *Lenahan v. O'Keefe*, 107 Id. 620.

The same rule must be held to apply as to further orders concerning the care and custody of the children.

There was clearly no error on the part of the court in entertaining jurisdiction of the petition in this case, for a modification of the decree concerning the custody of the child.

The only remaining question is, did the court exercise a sound judicial discretion, in granting the prayer of the petition and decreeing the custody of the child to appellee? A careful examination of the record fails to satisfy us that the court committed any error in this respect. The chancellor,

who entered the decree appealed from, had the parties before him, saw them, and heard them testify, and therefore had better opportunities than we have of ascertaining and determining what ought to be done in the premises, and what was for the best interests of the child.

We deem it unnecessary to detail the evidence, but we think it was amply sufficient to warrant the decree. It must be remembered that the decree of divorce was rendered for the fault of the mother, to wit, desertion. There is nothing in the record to show that the father has ever done anything to forfeit his right to the care and custody of the child, which in law is paramount to that of the mother. It was doubtless awarded to her in the original decree because of the tender years of the child, it being then only about six years old. The boy is now about thirteen years old, and beyond the age when it is so essential he should have a mother's care. The evidence shows he needs the guiding hand of a father, and a stronger control than that heretofore exercised over him by the mother. Besides, it is admitted that the intention is to take him out of the State and beyond the jurisdiction of the court, where his father and brother and sister would have no opportunity of visiting or associating with him. This is against the policy of our law, and ought not to be permitted. *Miner v. Miner*, 11 Ill. 43.

Under the evidence and all the facts and circumstances of the case, we think the decree was right and it will be affirmed.

Decatur Morgan et al. v. Grand Prairie Seminary.

1. CHARITABLE USES—*The Statute of 43 Eliz., Chap. 4, is in Force in this State.*—The statute of 43 Eliz., Chap. 4, is in force in this State, and under that statute a bequest for the education of "boys who reside in the State of Illinois between the ages of twelve and eighteen years, who are unable to educate themselves," is a valid bequest for a charitable use, and not void for uncertainty.

70	575
171s	444
171s	453

2. *EQUITY—Has Power to Appoint Trustees to Administer a Charity.*—A court of equity has ample power to appoint trustees, with authority to administer a charity, and carry out a trust created by the terms of a will.

3. *SAME—Jurisdiction in Carrying into Effect Charitable Bequests.*—Courts of equity take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if sufficiently certain to be intelligible, and without regard to the fact of the existence of a trustee capable of holding the legal estate.

4. *WILLS—A Will Construed.*—Construing the will in controversy in this case as a whole and giving effect to each part, it would seem that the duty of the trustees and their connection with the fund does not end with the erection of the building, but they are to continue in the management of the fund and administration of the charity as well after the building is erected as before.

5. *SAME—Charities—Intention of the Testator.*—It is not the province of the courts to inquire into or determine whether the plan and object of a charity are the most judicious. Unless some rule of law is violated the intention of the testator must be respected and his wishes carried out, even though it is clear that some other plan or scheme would have been wiser and better. If the directions of the testator can possibly be carried out there is no authority in the court to construe them to be void.

6. *SAME—Charities—Insufficiency of Bequest.*—The insufficiency of the fund provided furnishes no reason for defeating a bequest, if the intention of the donor can, to some extent, be carried into effect; and a bequest for the establishment of a school, and the payment of teachers to be employed therein, is not void because provision is not made for fuel, janitor service and repairs.

7. *SAME—Bequest on Condition that City Donate Lot.*—A will provided for the establishment of a school, on condition that the city where it was to be located should donate a suitable lot. The lot was furnished, but whether the city used public funds to purchase the lot, or whether it was donated by citizens who desired the condition complied with, did not appear, on a bill to declare the bequest void. *Held*, that the donation may have been perfectly legal, and that the bequest ought not to be declared void because the testator may have contemplated an act beyond the power of the city.

BILL, for the construction of a will. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded, with directions. Opinion filed June 26, 1897.

HILSCHEE & GOODYEAR, attorneys for appellants.

Here the benefit is to an indefinite class of persons, and the charitable use and the beneficiaries are both sufficiently

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certain and are sufficiently described to indicate the intention of the testator. Neither is left to the judgment of the trustee or the court. The bequest, therefore, meets every requirement of the law to create a public charitable trust. 2 Pomeroy's Eq. Jur., 1019 and 1025; 2 Storey's Eq. Jur., 1169 *et seq.*

This will presents a much stronger case of a charitable bequest for educational purposes than many others in which such bequests have been upheld, as :

Gifts for the promotion of education, generally, or for the education of any designated class of persons in a town, district or State. Att'y Gen. v. Parker, 126 Mass. 216.

For the education and tuition of worthy, indigent females. Dodge v. Williams, 46 Wis. 70.

Educational purposes. Decamp v. Dobbins, 29 N. J. Eq. 36.

A devise to a county for the education of certain classes of children. Craig v. Secrist, 54 Ind. 419.

To defray the expense of educating poor children in a certain district. Birchard v. Scott, 39 Conn. 63.

A fund to be expended in the education of scholars of poor people in a certain county. Clement v. Hyde, 50 Vt. 716.

Charitable bequests are upheld and aided in this State by virtue of the Statute of 43 Elizabeth, Ch. 4, which is held to be in force in this State, and by reason of the general power of a court of equity, to extend its jurisdiction over such matters. Heuser v. Harris, 42 Ill. 425; Andrews v. Andrews, 110 Ill. 223; Starkweather v. Am. Bible Society, 72 Ill. 50; Crearar v. Williams, 145 Ill. 647; Taylor v. Keep, 2 Ill. App. 368.

That certainty which the law requires to make a private bequest good is not required to make a bequest to public charity good. Elements of uncertainty which would cause the one to fail would not cause the other to fail. This doctrine has been adopted by our Supreme Court. Heuser v. Harris, 42 Ill. 434.

The clear object of the bequest is education. The bene-

ficiaries are a fluctuating but definite class of boys. The words of the will "for the purpose of educating boys * * * between the ages of twelve and eighteen years," define the class and mean that education suitable to the class thus defined. The words "who reside in the State of Illinois * * * and who are unable to educate themselves," still further define the class of the beneficiaries. The bequest, therefore, so far as its objects and purposes and its contemplated beneficiaries are concerned, meets every essential requirement of certainty which a public charitable bequest need have. 2 Pomeroy Eq. Jur., 1019 to 1025; Perry on Trusts, 720; Dodge v. Williams, 46 Wis. 70.

"In carrying into execution a bequest to an individual, the mode in which the legacy is to take effect is deemed to be of the substance of the legacy; but when the legacy is to charity, the court of chancery will consider charity as the substance, and in such cases, if the mode fail, it will provide another mode by which the charity may take effect." Heuser v. Harris, 42 Ill. 434, and cases there cited.

The doctrine, as we understand it to be enforced in this State, will not permit a trust for charity, otherwise valid, to fail for want of a designated trustee. When property is thus bequeathed to a person incapable of taking, or to a body uncertain, indefinite and fluctuating in its members, or to a body not in legal being, or even where there is no person or body indicated as the recipient of the legal title, but the property is merely directed to be applied to some designated charitable purpose, it will be upheld. Pomeroy Eq. Jur., 1026; Heuser v. Harris, 42 Ill. 425; Crearar v. Williams, 145 Ill. 652; Mills v. Newberry, 112 Ill. 133; Hunt v. Fowler, 121 Ill. 279.

When the purpose of a charity is clear and its objects lawful and its beneficiaries designated so as to be ascertainable, then the possibility, and not the probability, that it may be carried into effect is the only remaining requisite. The courts will not inquire whether the testator might not have

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disposed of his property with greater wisdom. "It is not the province of the chancellor to inquire into or determine whether the plan and object of the charity are the most judicious." *Gilman v. Hamilton*, 16 Ill. 230.

"It is an established maxim of interpretation that the court is bound to carry the gift into effect, if it can see a general charitable intention, consistent with the rules of law, even if the particular manner indicated by the donor is illegal or impracticable." "The bequest is not void and there is no authority to construe it to be void, if by law it can possibly be made good." *Perry on Trusts*, 709.

In considering a question very similar to those raised in the bill as to the want of provision in the will for fuel, janitor, repairs, etc., our Supreme Court has said "we might admit even a conclusion that it (the trust property) never could become sufficient, and still it may not show a total failure of the charity; others may contribute, other means and funds may be obtained, and the end accomplished." *Gilman v. Hamilton*, 16 Ill. 228.

STEVENS, HORTON & ABBOTT and KAY & KAY, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Legrande L. Wells, a citizen of Watseka in this State, departed this life in 1883, leaving his last will and testament, which was duly filed; and admitted to probate in the County Court of Iroquois County, on October 20, 1883. Appellants were named as executors and trustees in the will, duly qualified and are still acting as such. The estate having been practically settled, except as to the disposition of a fund of about \$30,000 provided for in the will, appellee filed its bill against appellants as such executors and trustees, praying a construction of the will, and a direction as to the disposition of this fund of \$30,000, accumulated in the hands of the trustee. The latter portion of the fifth clause of the will, is the only one in controversy, and is as follows:

I further direct that my trustees and their successors manage my estate until it has accumulated a fund of at least \$30,000, after setting aside a sufficient sum to pay all specific legacies, debts, etc., which shall form a fund known as the "Wells Fund," and shall be used in the following manner, to wit: If the city of Watseka will donate a suitable lot for such purpose within thirty days after being notified by said trustees, said trustees shall cause a building to be erected on said lot for the purpose of educating boys who reside in the State of Illinois, between the ages of twelve and eighteen, and who are unable to educate themselves, which shall cost not exceeding \$5,000, and the balance of my estate in the hands of my said trustees, after the payment for said building, shall be kept at interest, and the net income, except \$10 per year, set apart for the purpose of keeping my family burial lot in repair, shall be used for the purpose of paying teachers employed in said school; and I further direct my said trustees that in case the city of Watseka refuses or neglects for thirty days after being notified by the trustees that they are ready to carry out this provision in said will as to said school, then they shall pay the whole sum set apart for this purpose over to the finance committee or trustees of Onarga Seminary, located at Onarga, Illinois, the net income of which shall be used to carry on said seminary, and shall be known as the "Wells Fund."

The bill alleges, and it is admitted by appellants, that appellee is the same institution and seminary designated in the will as "Onarga Seminary, at Onarga, Illinois."

The bill further alleges that said fund has reached upward of \$30,000 in the hands of said trustees, exclusive of all specific legacies.

The bill then proceeds as follows:

"That complainant is informed and believes and states that within the last thirty days and within thirty days after being notified that said fund had reached \$30,000, the city of Watseka caused to be tendered to the trustees a deed for lots situated in the city of Watseka; that said lots were purchased by the city of Watseka and caused to be conveyed

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by the owners, from whom purchased, directly to the trustees aforesaid. That complainant is informed that said trustees have signified the acceptance of the lots so tendered as aforesaid. Complainant avers that the said city of Watseka has no power or authority in law to furnish any lots whereon to erect a school of the character designated in said will, and that said trustees have no legal right, power or authority to receive or accept said lots or expend any money in the erection of a building thereon, as in said will suggested.

That it is the intention and purpose of said trustees to set apart and expend \$5,000 in a building upon the lots so conveyed to them.

Complainant charges that said trustees have no right, power or authority under said will to expend any sum in the erection of a school building upon lots so attempted to be donated to them by the city of Watseka, or to take title to the lots as trustees. That no person is designated by said will to hold the title to said lots, nor is any person designated in said will to manage and control said fund after the expenditure of \$5,000 in erection of a school building. That it is not provided that said fund shall remain in the hands of said trustees after the building of said house, nor is any disposition attempted to be made of the remainder of said fund. That the purpose of the remaining portion of said fund is to educate boys residing in Illinois between the ages of twelve and eighteen years, who are unable to educate themselves. Complainant avers that as soon as said building is erected the offices of said trustees and their connection with the fund cease. That will does not provide any one to determine what boys shall be educated in said building, does not provide that any one shall have control of the property or to say what teachers shall be hired or what their compensation shall be, does not provide means for operating the school except to use the interest to pay teachers, does not provide for heating or repairing the building, and does not designate any tribunal for that purpose. It is wholly uncertain and indefinite and can not be utilized unless the

court constructs the machinery and practically makes a will for the testator. Complainant avers that said bequest for a school building and a school for the purposes named is so uncertain as not to be enforced or upheld; that to give it validity the court would have to appoint trustees, provide for succession, and either divert the purposes expressed in the will for the use of the income to other purposes, or procure in some method the means of carrying on the school; to keep the property in repair, to heat it and to operate it as a school, also a tribunal to decide what boys in Illinois are unable to educate themselves. Complainant charges that the bequest for the purpose of erecting a building is so uncertain as to be void."

We have thus quoted from the bill at length, in order that the claims of appellee may be fully set forth.

It further appears from the bill that appellee is conducting a school for general educational purposes at Onarga, and has so carried it on for upward of thirty years in successful operation. And it is alleged that the purpose of the testator can be better carried out by turning the fund over to appellee who has demanded of appellants that they turn over the fund to it.

The contentions of appellee, as we understand them, are :
1st. That the bequest is void for uncertainty.

2d. That the trustees have nothing to do with the fund beyond the expenditure of \$5,000 for the erection of a building, and that no one is designated to receive the balance of the fund, and manage it so as to carry out the objects of the bequest.

3d. That the court is without power to create the machinery to carry out the express intention of the testator with reference to the education of the boys designated.

4th. That the bequest is wholly incapable of enforcement or execution.

5th. That the will requires the city of Watseka to do, as a condition precedent, that which it has no power to do.

There was a demurrer to the bill, which being overruled by the court, and appellants abiding by their demurrer, a

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decree was entered in favor of appellee, according to the prayer of the bill, and appellants were ordered to pay the fund over to appellee to be invested and disposed of according to the terms of the will in case the original bequest should fail.

Appellants prosecute their appeal to this court.

We think the court erred in overruling the demurrer to the bill and decreeing that the fund be paid to appellee.

By numerous decisions of our Supreme Court the statute of 43 Eliz., Chap. 4, is held to be in force in this State. *Heuser v. Harris*, 42 Ill. 425; *Andrews v. Andrews*, 110 Ib. 223; *Crearar v. Williams*, 145 Ib. 647.

Under that statute it is clear that there was in the will under consideration a valid bequest for a charitable use, to wit: the education of "boys who reside in the State of Illinois between the ages of twelve and eighteen (years) who are unable to educate themselves." It was not void for uncertainty.

In the case of *Heuser v. Harris*, *supra*, the testator provided that one-half of the interest on the fund created should be used for the schooling of children in a certain school district, and the other half should go to the support of the poor of Madison county. The bequest was sustained as a valid bequest for charitable uses. The reasoning of the court in that case answers almost every objection raised by appellees in the case at bar.

Many cases might be cited where the objects of the charity were certainly as indefinite as those in this case, and yet they have been upheld. *Att'y Gen'l v. Parker*, 126 Mass. 216; *Dodge v. Williams*, 46 Wis. 70; *Decamp v. Dobbins*, 29 N. J. Eq. 36; *Birchard v. Scott*, 39 Conn. 63; *Clement v. Hyde*, 50 Vt. 716.

As to the second point, taking the will as a whole, and giving effect to each part, it would seem that the duty of the trustees and their connection with the fund does not end with the erection of the building but they are to continue in the management of the fund and administration of the charity, as well after the building is erected as before.

The third objection is not well taken. It is not necessary for the court to create the machinery to carry out the intention of the testator. He has done that for himself. By the terms of the will we think ample power is vested in the trustees to establish the school and carry it on, so far as the means provided will allow to effectuate the intention of the testator. But even if this were not so, the bequest would not, for that reason, necessarily fail. There is ample power in a court of equity to appoint trustees, with authority to administer the charity and carry out the trust. In the leading case of *Vidal v. Girard*, 2 Howard (U. S.), 127, it was held that donations for the establishment of colleges, schools and seminaries of learning, and especially such as are for the education of orphans and poor scholars, are charities, in the sense of the common law, and that under the statute, 43 Eliz., Chap. 4, such charities are not void because the beneficiaries thereof are uncertain and indefinite, and a court of equity has jurisdiction to enforce the charity for their benefit. *Heuser et al. v. Harris*, 42 Ill. 433.

Courts of equity take jurisdiction in carrying into effect charitable bequests, however general are the purposes and objects intended, if sufficiently certain to be intelligible, and without regard to the fact of the existence of a trustee capable of holding the legal estate. 2 Story's Eq. Jur., Sec. 1154, 8th Edition.

The fourth objection is equally untenable. We can not say that the charity is incapable of being administered, or executed and enforced according to the will of the testator. It certainly is not impossible, and if not, then the court has no right to declare the bequest void.

The doctrine is that a bequest is not void, and there is no authority in the court to construe it to be void, if by law it can possibly be made good. *Perry on Trusts*, 709.

It may be that the testator has not adopted the wisest mode in which to give effect to his charitable intentions. It might perhaps have been better had he made the donation unconditionally to appellee, but he did not choose to do so, and he had a right to do what he would with his own.

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It is not the province of the courts to inquire into or determine whether the plan and object of the charity are the most judicious. Unless some rule of law is violated, the intention of the testator must be respected and his wishes carried out, even though it is clear that some other plan or scheme would have been wiser and better. *Gilman et al. v. Hamilton et al.*, 16 Ill. 225.

It is urged that the will makes no provision for furnishing fuel and janitor services, or making repairs for the building, and that without these things a school could not be successfully carried on. It is true the will provides that the net income from the fund "shall be used for the purpose of paying teachers employed in said school," and it does not specifically provide for fuel, janitor services or repairs. But we are not disposed to place so narrow a construction upon the will, as to defeat the bequest for these reasons, or to hold it is impossible of being made effective because the testator did not go into minor details concerning the expenses of running the school. It is still not impossible the school could be carried on a portion of the year, when no fuel is needed, and the cases have been numerous, where scholars have done their own janitor work without expense to the school.

Questions similar in principle to those presented here, were raised in the case of *Gilman et al. v. Hamilton et al.*, *supra*, and it was held that the insufficiency of the fund provided, was no good reason for defeating the bequest, if the intention of the donor could, to some extent, be carried into effect.

As to the proposition that the bequest is invalid because it is based upon the condition that the city of Watseka shall donate a suitable lot upon which to erect the school building, we do not agree with the contention of appellee. Nor does it seem to us that appellee has any right to raise that question. The will does not require the city of Watseka, in its corporate capacity, and by the use of public funds to procure and donate the lot. If it had, then the power of the city to make such donation for the purpose of

having a school established in its limits, might depend upon its charter, and the authority therein conferred upon the municipality, and as to this question there is nothing in the bill or the record to show what powers the city possessed.

But we think this clause in the will means nothing more than if the condition had been that the citizens of Watseka should donate the lot. It was not impossible for the city, as a municipality, to comply with the condition without violating any public law, or using public funds for the purpose. If the citizens of Watseka voluntarily raised the money to purchase a suitable lot and conveyed it to the city in trust, to be donated for the purpose of meeting the condition of the will, we fail to see wherein there would be anything illegal in the transaction. It appears from the record that this condition of the will has been complied with, by the city, and the lot has been donated and conveyed to the trustees. Whether or not the city used public funds to purchase the lot, or whether they were donated by benevolent citizens who desired the condition complied with does not appear. The donation may have been perfectly legal, and the bequest is not to be declared void because the testator may have ignorantly contemplated an act beyond the power of the city.

The bequest can be made good, without the doing of any illegal act on the part of the city, and we are not authorized to hold it void.

For the reasons given the decree will be reversed and the cause remanded, with directions to the Circuit Court to dismiss the bill.

W. S. Catton v. H. H. Dexter.

1. **VERDICTS—Upon Conflicting Evidence.**—While the evidence in this case was conflicting, the court can not say that the jury was not warranted in finding as they did. Certainly the verdict is not so manifestly against the weight of the evidence as to require a reversal of the judgment for that reason.

Catton v. Dexter.

2. **ERROR—Without Injury, not Ground for Reversal.**—The fact that instructions as to the measure of damages were conflicting and inharmonious, and contained inaccuracies, furnishes no ground for complaint where no damages were allowed.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Livingston County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

HERBERT POWELL, attorney for appellant.

C. F. H. CARRITHERS and E. A. AGARD, attorneys for appellee.

MR. JUSTICE CRABTREE DELIVERED THE OPINION OF THE COURT.

Appellee sued appellant before a justice of the peace, to recover a balance of \$30.25 which he claimed to be due him upon a contract to deliver ice to appellant for the season of 1894. A trial before the justice resulted in a judgment in favor of appellee for the sum of \$30.25.

Upon appeal to the Circuit Court, there was a trial by jury, resulting in a verdict and judgment for appellee for the same amount.

Appellant insists upon a reversal for two reasons:

1. That the verdict is not supported by the evidence, and
2. That the court gave erroneous and misleading instructions.

It appears from the evidence that appellant was a butcher dealing in meat, and appellee was a dealer in ice. The parties substantially agree that appellee contracted to deliver ice to appellant for the season of 1894 for \$110, but as to whether the season was to run longer than to October 15, 1894, there is some dispute.

There were mutual accounts between the parties, and when they came to settle, appellant claimed that by reason of appellee having failed to deliver ice on October 17, 1894, according to contract, he had meat of the value of \$34.30

spoiled for want of such ice, and he demanded a deduction of that amount. This was in the latter part of December, 1894, or early in January, 1895, and was the first time that appellee had heard anything about a claim for meat spoiled for want of ice. This is the only item in dispute, the parties agreeing as to all other items in the mutual accounts.

There is a controversy in the evidence, as to whether ice was furnished on October 17, 1894 or not. The preponderance of the evidence seems to show it was. Evidently the justice of the peace, as well as the jury in the Circuit Court, rejected this claim of appellant for damages for meat spoiled, and we can not say they were not warranted by the evidence in so doing. Certainly the verdict is not so manifestly against the weight of the evidence as to require a reversal of the judgment for that reason.

There is some evidence tending to show that appellant could have obtained ice from other sources, if he had tried, and if he could, and did not do so, then the meat was spoiled through his own negligence and he could not recover the value thereof from appellee. His only claim would have been for the value of the ice which appellee failed to deliver, if he was bound, under the contract, to deliver any ice after October 15th. But there is no proof whatever, as to the value of the ice, and no allowance could be made therefor, even had the case been tried upon that theory, which, however, it was not.

It can not be denied that there are some inaccuracies in the instructions. but taken as a whole, we can not say the jury were misled by them.

Upon the measure of damages, the instructions were conflicting and inharmonious, but as the jury rejected appellant's whole claim for damages, and allowed nothing whatever therefor, these instructions could have done no harm. We see no sufficient reason for reversing the judgment on account of the instructions.

Appellant having had two trials on the questions involved, both of which resulted against him, we think he must now be satisfied to let the litigation end. Seeing no good reason why the judgment should be reversed, it will be affirmed.

Peoria Grape Sugar Co. v. Henry D. Turney et al.

1. **AGENCY**—*The Relation Found not to Exist.*—The court holds that the person making the warranty relied on by appellants was not the agent of appellees, and hence not authorized to make such warranty.

2. **INTEREST**—*Allowed on Account of Unreasonable and Vexatious Delay of Payment.*—The court holds in this case that there was such vexatious delay in the payment of the claims sued on, as the statute contemplates, and the allowance of five per cent interest from the maturity of the debt is approved.

Assumpsit, for goods sold and delivered. Appeal from the Circuit Court of Peoria County; the Hon. THOMAS M. SHAW, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

PAGE, WEAD & PUTERBAUGH, attorneys for appellant.

RUNNELLS & BURRY, attorneys for appellees.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was an action of assumpsit brought by appellees to recover for coal sold and delivered to appellant under a parol contract in December, 1893, and January, 1894, and under a written contract in February, 1894. A trial by jury resulted in a verdict and judgment in favor of appellees for \$2,396.06.

There are two grounds upon which appellant chiefly relies for a reversal, viz.:

1. That the coal delivered was sold under an express warranty as to its steam producing qualities, and that there was a breach of that warranty by reason of which appellant suffered great damage which was not allowed it as against the purchase price of the coal.

2. The amount found by the jury was excessive by reason of their allowing interest to the appellees.

The evidence in the record shows that D. H. Turney & Co. are extensive dealers in coal, having a branch office in

Peoria. Prior to December, 1893, they had contracted to take the entire output of the Reed City coal mines, mines located about thirteen miles west of Peoria. In their efforts to have the coal from those mines taken by large consumers in Peoria, appellant, which is a corporation operating a glucose plant in that city, was induced to order quite a number of car loads, which were delivered from time to time during the months of December, 1893, and January, 1894.

One James Sterritt was the superintendent of the Reed City Coal Company, and was quite active in assisting Turney & Co. in their efforts to induce appellant and other consumers to use the coal from those mines. He made certain representations as to the steam producing qualities of the coal, which upon testing were shown to be false. It is contended that those representations amounted to a warranty of Turney & Co.

It should be observed that Sterritt was not in the employ of Turney & Co., and was not authorized to make a warranty. His activity in the matter was in the interest of the coal company, because, under its contract with Turney & Co., the more coal that could be used in Peoria the better it would be for that company. The proofs show that appellant's manager was fully advised as to Sterritt's position in the matter. We are clearly of the opinion that Sterritt was not authorized to warrant the quality of the coal for appellees, and in that view it is not necessary to discuss the conflict between his testimony and that of appellant's manager, Rhodehamel.

After appellant had been using the coal for two months, it was sufficiently satisfied with it to enter into the following written contract in which there is no semblance to a warranty or any representation as to steam producing qualities:

"CHICAGO, Feb. 1, 1894.

The Peoria Grape Sugar Works, Peoria, Ill.

GENTLEMEN. Confirming our conversation, we desire to submit the following proposition:

We will agree to furnish you with your entire require-

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ments of coal, which we understand to be from four to eight cars per day, of our Reed City lump coal delivered on board cars at your works, from date to February 1, 1895, for \$1.20 per net ton. Mixed, nut, pea and slack made from lump taken by you at ten cents per net ton at the mines. Mine weights as taken at original point of shipment to govern settlement, and payments to be made for coal on or before the 20th of the month next, following shipment.

This proposition is made subject to strikes, contingencies of transportation and other causes beyond our control.

Yours very truly,

H. D. TURNERY & Co.,

Per ADAMS & O'GARA, Ag'ts.

H. C. A.

We accept the above proposition.

PEORIA GRAPE SUGAR Co.,

By B. F. RHODEHAMEL, Manager."

If the coal fell so far short of Sterritt's representations, as appellant would have us believe, it seems to us that appellant's manager was guilty of great oversight in not having the written contract contain some requirement as to quality.

All deliveries of coal after the 1st of February, 1894, were governed by that contract. Hence instructions one and two given for appellees were not erroneous.

Entertaining the view as above expressed, that Staritt was not the agent of appellees, the giving of the eighth instruction was proper.

We see no good cause for complaint as to the giving or modifying of instructions upon the question of warranty.

As to the other ground urged, we are of the opinion that the allowance of interest was proper. There was such vexatious delay in the payment of the claim as the statute contemplates. Appellees were entitled to interest from the 20th of March, 1894, the date when appellant's obligation to pay matured.

Hence, the giving of appellee's fifth instruction, that if the jury found for the plaintiffs and further found from the evidence that there had been unreasonable and vexatious

delay in the payment of the amount they should allow five per cent interest was proper.

The jury really fixed the damages at a less amount than appellees were entitled to.

There is no sufficient ground for a reversal of the judgment. Judgment affirmed.

70	592
70	596

George T. Gilliam v. Merchants' National Bank.

1. **BANKS AND BANKING—*Bank's Liability on Checks.***—The liability of a bank on a check only arises on presentation, and although at the time the check was drawn there were funds on deposit sufficient to satisfy it, yet if they were exhausted before its presentation by the payment of checks subsequently drawn, no liability attaches to the bank.

2. **SAME—*It is Not the Duty of a Bank to Hold Funds to Meet an Outstanding Check.***—When payment of a check is refused because the drawer has no funds, there is no presumption that the check remains outstanding for payment, and no duty devolves on the bank to reserve from a future deposit, an amount sufficient to satisfy it.

3. **SAME—*Bank's Liability on Checks—Proof Required to Establish.***—Before recovery can be had on a check, the evidence must show that when the check was presented there was money in the bank to pay it.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Peoria County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the December term, 1896. **Affirmed.** Opinion filed June 26, 1897.

G. T. GILLIAM, *pro se*.

WINSLOW EVANS, attorney for appellee.

It is no doubt the rule, that where a party drawing a check on a bank has funds on deposit with such bank equal to or greater than the amount of the check, on presentation of the check at the bank for payment by the drawee, while sufficient funds are on deposit, the bank becomes liable to the holder of the check, and if it refuses payment, the holder of such check may maintain suit thereon in his own name against the bank. *Munn v. Burch*, 25 Ill. 21.

But checks drawn upon a bank not having sufficient

funds of the drawer on deposit for all, are to be paid according to priority of presentment, and not according to priority of date or execution. 2 Daniels on Bills, 16 and 17 A; 2 Morse on Banking, Sec. 450.

"The rule with checks is, 'First come, first served.' If payment is demanded at noon upon a check which the depositor's unincumbered balance at that hour is sufficient to pay in full, the obligation of the bank to pay it in full is at once mature and perfect. It is no matter how many checks may be presented at later hours, nor how much the sum of all the checks presented in the course of the day may exceed the amount of the customer's balance. This is no concern of the bank; not even if it has been informed that such checks have been drawn and will be presented for payment." 2 Morse on Banks, Section 450.

A bank is not bound to promise to receive funds of drawer to pay at any future day or hour. Its only duty is to make immediate payment when demanded if in funds. 2 Morse on Banking, Sec. 453.

"The burden is on the plaintiffs to show that at the time their check was presented for payment, the bank had on deposit to the credit of the drawer, a sufficient sum of money to pay it."

"It is not enough to show that the drawer made adequate deposits on the same day, as they may have been made subsequent to the presentment of the check." International Bank v. Jones et al., 15 Ill. App. 594.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

On December 31, 1896, Singer & Wheeler, a corporation doing business at Peoria, Illinois, drew a check for \$118.35 in favor of appellant upon appellee, a bank with which it had been doing business as a corporation. The check was presented for payment on January 2, 1896 which was refused because Singer & Wheeler had no funds in the bank. It was again presented on January 3d, and payment refused for the same reason.

On January 8th a deposit was made of \$8,000 which was all paid out on checks and overdrafts except \$933.61 which balance was on deposit when Singer & Wheeler made a deed of assignment for the benefit of creditors, June 10, 1896. The deed of assignment was filed for record and the assignee entered upon the discharge of his duties January 11th. On January 15th the check was again presented to the bank and payment refused.

This suit followed, resulting in a verdict and judgment for the bank.

In seeking a reversal of the judgment, appellee urges an application of the rule of law in this State that the delivery of a check upon a bank where the drawer has funds to satisfy it, is an assignment *pro tanto* of the deposit to the payee.

Under that rule, however, the liability of the bank is affected only by a presentation of the check. Although at the time of drawing the check there were funds sufficient to satisfy it, yet if they were exhausted by the payment of checks subsequently drawn and before its presentation no liability would attach to the bank. 2 Morse on Banks, Secs. 450, 453; Coats v. Preston, 105 Ill. 470.

Appellant encounters a most serious obstacle in the fact that when he presented his check on the 2d and 3d days of January there was no deposit to draw against.

It is contended, however, that a presentation on those dates involved a duty upon the bank to reserve from the deposit made upon the 8th of January an amount sufficient to satisfy it. No authority is cited in support of that contention, and we do not think a duty of such character devolved upon the bank. When the payment of a check is refused because the drawer has no funds, no such presumption should obtain as that the check remains outstanding for payment.

The natural course for the payee to pursue in such case would be to take immediate steps against the drawer to make good the dishonored check.

The contention of appellee involves the absurd proposi-

Tarrant & Co. v. Merchants' National Bank.

tion that a bank is required to keep a record of all checks refused payment because of lack of funds of the drawer, and then retain from any future deposit an amount sufficient to pay them.

Again, there is no proof in the record that when the check was presented on the 15th of January, there was money in the bank to pay it. Such proof was necessary to a recovery, independent of the fact that an assignment had been made for the benefit of creditors. *International Bank v. Jones*, 15 Ill. App. 594.

According to the rule announced by the Supreme Court of the United States in the case of *Laclede Bank v. Schuler*, 120 U. S. 591, appellee was not entitled to have his check paid out of the balance of \$933.61 when presented for payment on January 15th, because four days before that time the assignee had qualified and was entitled to the fund.

We do not base our judgment upon that rule, however, but affirm for the other reasons set forth in this opinion. Judgment affirmed.

Tarrant & Company v. Merchants National Bank.

1. **FORMER DECISIONS—*Approved and Followed.***—The facts of this case are practically the same as those recited in *Gilliam v. Merchants National Bank*, page 592, this volume, and the judgment is affirmed for the reasons set forth in the opinion filed in that case.

Transcript, from a justice of the peace. Appeal from the Circuit Court of Peoria County; the Hon. NICHOLAS E. WORTHINGTON, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

GEORGE T. GILLIAM, attorney for appellant.

WINSLOW EVANS, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is a suit on a check for \$87.65 drawn by the Singer

& Wheeler corporation on appellee in favor of appellant and presented for payment on the 3d and 15th days of January, 1896. There was a finding and judgment in favor of appellee.

The facts are practically the same as those recited in *George T. Gilliam v. Merchants National Bank*, *supra*, and we affirm the judgment for the reasons set forth in the opinion filed in that case.

**Chicago Opera House Company, for Use, etc., v.
Louis E. Paquin.**

1. *RES JUDICATA—Parties Must Appear in Same Capacity and Subject-Matter Must be Identical.*—A finding for the defendant upon a plea of former recovery can not be sustained where the parties to the judgment pleaded were not parties in the same capacity as those in the suit in which the plea is filed or where the issues are not identical.

2. *SAME—Suit for Rent, After Recovery on Bond in Forcible Entry and Detainer Proceedings.*—The defendant in a forcible detainer suit having been defeated took an appeal giving the usual bond. The appeal was subsequently dismissed and possession of the premises surrendered, but in the meanwhile rent had accrued in excess of the penalty of the bond. *Held*, that the landlord had two separate causes of action for rent; one upon the appeal bond against the tenant and his security, and the other against the tenant for rent due in excess of the amount of the bond and that a recovery upon the former demand was not a bar to a suit upon the latter.

Attachment.—Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed June 26, 1897.

STATEMENT OF THE CASE.

In April, 1891, Louis E. Paquin entered into possession of rooms 801 and 803, Chicago Opera House Building, in the city of Chicago, under a written lease. By the terms of the lease he was to pay thirty-three dollars a month as rent. He paid rent up to and including the month of Jan-

Chicago Opera House Co. v. Paquin.

uary, 1892, when he made default in his monthly payments. In April, 1892, lessor, The Chicago Opera House Company, brought a suit for possession before a justice of the peace and recovered a judgment. Paquin, the defendant, took an appeal to the Circuit Court of Cook County, giving the usual appeal bond in forcible entry and detainer for five hundred dollars, with one Gabriel Franchere as security. While the appeal was pending, Paquin continued to occupy the premises.

The appeal was dismissed for want of prosecution at the April term of court, 1894, and Paquin surrendered possession of the premises the same month. There was then due for rent \$891. In March, 1895, the Chicago Opera House Company brought suit against Louis E. Paquin and Gabriel Franchere, as principal and surety, respectively, on the bond given in the forcible entry and detainer suit. At the April term of court Franchere was defaulted for the want of a plea and judgment rendered against him for the penalty in the bond, to wit, five hundred dollars. Defendant Franchere appealed the case to the Appellate Court for the First District, where the appeal was dismissed on October 7, 1895. Franchere immediately thereafter paid the judgment, and same was satisfied of record in both Circuit and Appellate Courts. On November 11, 1895, Gabriel Franchere took an assignment of the balance of rent due the Chicago Opera House Company after recovering five hundred dollars by suit on the bond against Franchere.

At the December term, 1895, of the Kankakee County Circuit Court, Gabriel Franchere brought two suits in attachment against Louis F. Paquin, one for moneys paid out on behalf of the said Paquin in satisfaction of the judgment rendered against him as surety on the appeal bond, in which he recovered a judgment of five hundred and fifty-one dollars. The other was this suit brought in the name of the Chicago Opera House Company for the use of Gabriel Franchere, for the balance of rent due. To the declaration the defendant filed two pleas, the general issue and a plea of former recovery.

In the latter plea it was set up that the judgment rendered against Gabriel Franchere in the Circuit Court of Cook County, on the first day of April, 1895, is a bar to this action.

Issue was taken upon the plea, a jury was waived, and a trial was had by the court, resulting in a finding and judgment for defendant.

HOWARD AMES and GRANGER & DAVIDSON, attorneys for appellant.

THOS. P. BONFIELD, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

A finding for defendant upon the plea of former recovery was erroneous. The parties to the judgment pleaded, were not parties in the same capacity as those in this suit and the issues were not identical.

There were two distinct causes of action against Paquin; one in favor of Franchere, by reason of the recovery and payment of the judgment against him on the appeal bond of Paquin, and one in favor of the Opera House Company for rents over and above the amount of the appeal bond. The failure of the Opera House Company to invoke the aid of the court to require the defendant in the forcible detainer appeal suit to give additional bond, when it became apparent that before the case would be reached for trial rents would accrue which would exceed the amount of the bond, did not preclude the Opera House Company from a right to recover for rent above the amount of the bond.

The fact that the Opera House Company, in its suit upon the appeal bond, recovered for rents up to the amount of the bond, \$500, did not debar it from recovering in a suit against Paquin alone for the \$391 additional rent. It is absurd to say that having elected to sue on the bond for rents it thereby elected to abandon all further claim against Paquin.

Crete Farmers' Mut. Township Ins. Co. v. Miller.

At the time suit was brought upon the appeal bond the Opera House Company had two separate causes of action for rent; one upon the appeal bond against Paquin and his surety Franchere, and another against Paquin for rent accruing during the pendency of the appeal suit above the amount of the bond.

There should have been a recovery for appellant. Reversed and remanded.

**Crete Farmers' Mutual Township Insurance Co. v.
Simon Miller.**

1. *INSURANCE—Construction of Forfeiture Clauses.*—A provision in an insurance policy that, under certain circumstances, the policy shall be void, should be construed most strongly against the insurer.

2. *SAME—Effect of Unlawful Use of Property.*—The temporary use of insured property for purposes forbidden by the policy only suspends its operation, and when such use ceases the policy revives.

3. *SAME—Questions Involved Where Risk is Alleged to be Increased by Alterations.*—Under the policy sued on in this case, the first question is, did the building of the shed and the use of the gasoline engine increase the risk? And if it be found that the risk was thereby increased, then the question arises whether there was any increase in the risk when the engine was not in operation, and whether the fire was caused by such increase.

4. *SAME—Objections to Title of Insured.*—In a suit on an insurance policy, the point that the plaintiff had but a leasehold interest in the land on which the insured building stood, when the contract required that he have title in fee simple, can not be made for the first time on appeal.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

HALEY & O'DONNELL, attorneys for appellant.

C. W. BROWN, attorney for appellee.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was a suit by appellee to recover on a fire insurance

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policy, covering a grain elevator, which was destroyed by fire on the 20th of April, 1894. He recovered a judgment for \$2,708.33.

A reversal of the judgment is urged for the reasons:

First. That the policy was rendered void because of the erection of a shed and the placing of a gasoline engine therein in close proximity to the elevator, which increased the risk.

Second. That appellee had but a leasehold interest in the property, which rendered the policy void under section fourteen of the act of incorporation under which appellant did business.

Appellant is a mutual fire insurance company, and the policy was limited by the provisions of its act of incorporation and by-laws.

Section 16 of the act of incorporation reads as follows:

"If any alteration should be made in any house or building by the proprietor thereof, after insurance has been made thereon with said company, whereby it may be exposed to greater risk or hazard from fire than it was at the time it was insured, then, and in every such case, the insurance made upon such house or building shall be void, unless an additional premium and deposit after such alteration be settled with and paid to the directors, but no alteration or repairs in buildings, not increasing such a risk or hazard, shall in any wise affect the insurance previously made thereon."

About two weeks before the fire occurred, George Miller, a son of appellee, having in charge the insured property, caused to be built upon the north end of the elevator a small shed, in which he placed a gasoline engine which he used for operating the machinery of the elevator. The machinery had before then been operated by horse power. The gasoline to run the engine was stored in a tank, set in the ground, thirty feet distant. The tank was lower than the engine, and the gasoline was pumped for consumption as required when the engine was running. There was a return pipe which allowed the gasoline in excess of con-

sumption to flow back to the tank, or when the engine was closed down.

It is contended that the erection of this shed, and the placing of this engine, etc., was such an alteration that it exposed the elevator to greater risk from fire than it was at the time it was insured, and therefore rendered the policy void. That contention is insisted upon irrespective of whether the fire originated in the shed.

Our Supreme Court has long been committed to the doctrine that provisions in insurance policies, with reference to what shall avoid a recovery in event of loss, are construed most strongly against the insurer. Following in the line of that doctrine, the court has frequently held that the temporary unauthorized use of property insured only suspends the operation of the policy, and that when such use ceases the policy revives. *New England Fire Insurance Company v. Whitemore et al.*, 32 Ill. 244; *Schmidt v. Peoria Fire and Marine Insurance Company*, 41 Ill. 295; *Insurance Company of North America et al. v. McDowell et al.*, 50 Ill. 120; *Insurance Company of North America v. Garland*, 108 Ill. 220; *Germania Fire Insurance Company v. Klewer*, 129 Ill. 599; *Traders' Insurance Company v. Catlin*, 163 Ill. 256.

Whether the building of the shed and the placing of the engine with gasoline tank, with appliances for operating it, increased the risk, was a question for the jury. If they found that it did increase the risk, then the further question for their decision was whether there was any increase of risk when the engine was not in operation, and whether the fire was caused by such increase. We think those questions were fairly submitted under the instructions of the court.

It would render this opinion too lengthy to review in detail the testimony of the witnesses as to the questions of increased risk and the origin of the fire. Much of it is speculative. It is sufficient for us to say that the preponderance shows that the fire did not have its origin in or about the shed or gasoline fixtures, but at the northwest corner of the elevator, some thirteen or fourteen feet from the shed.

To the contention that the policy was void, because appellee had but a leasehold interest in the land on which the elevator stood when section fourteen of the original act of incorporation required the insured to have title in fee simple unincumbered, it is sufficient to say that this point is now made for the first time. Neither by objection to evidence, motion to exclude, nor by instruction, was the point brought to the attention of the trial court. Had it been raised upon the trial appellee would have had an opportunity to show, if such was the fact, that at the time the insurance was taken he informed the officers of the company, or they knew of the true condition of the title.

Situated as the elevator was, on the right of way of the Illinois Central Railroad Company, where it had been for years, and where it had been insured in this same company for twelve years, the officers were doubtless well acquainted with the fact that appellee did not own in fee simple the land on which the elevator was located.

It may be said, also, that it does not appear from the abstract that section fourteen was in evidence, but if it was, the attention of the court was not called to its provisions.

No error was committed by the court in the refusal of offered instructions. Judgment affirmed.

Robert C. Hattenhauer v. Gustave H. Adamick.

1. *PARTNERSHIP—Each Partner is Presumed to Know the State of the Accounts of all the Partners.*—A partner having access to the books of his firm is presumed to know the state of the account of each partner.

2. *SAME—A Debt of a Partner to the Firm is Extinguished by a Sale to the Other Partners.*—Where the books of a firm show that one of the partners is indebted to the firm, the purchase of his interest in the partnership by the other partners extinguishes the debt.

Bill, for an accounting. Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

Hattenhauer v. Adamick.

FRED T. BEERS, attorney for appellant.

WIDMER & WIDMER, attorneys for appellee.

In the absence of fraud or mutual mistake, the effect of a sale of his interest by one partner to the others is to extinguish the retiring partner's indebtedness, if any, to the firm. It implies that he is to retain whatever he has already received from the firm, in addition to the consideration paid for his share in the assets. It is in effect an agreement that the sum paid is a balance due him after deducting what he has already received. *Farnsworth v. Whitney*, 74 Me. 370; *Norman v. Huddleston*, 64 Ill. 11; 17 Am. & Eng. Ency., p. 1, 109.

That partners may alter or modify their original partnership agreement, though it is in writing, by a subsequent oral arrangement, needs no citation of authorities here, and a change in the original contract may even be inferred from a long course of dealing inconsistent with its provisions. *McCall v. Moss*, 112 Ill. 493.

And such course of dealing may be shown by the partnership books. *Gregg v. Hord*, 129 Ill. 618.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of the Circuit Court dismissing upon final hearing a bill for an accounting, etc., filed by appellant against appellee.

The evidence in the record shows that on the 1st of March, 1887, a partnership was formed between appellant and appellee, and a written contract executed as follows:

"Articles of agreement made and entered into this 1st day of March, A. D. 1887, between Robert C. Hattenhauer and Gustave H. Adamick, as follows:

The above parties have agreed to become copartners in the business of dealers in drugs, medicines, paints, oils, including all articles usually kept in a general drug store.

The business is to be conducted at the city of La Salle, in the building owned by said Hattenhauer, also to have no

business connection with the business of said Hattenhauer, in Peru.

To commence at this date and continue one year. The said Adamick to employ his entire time, skill and business attention in the business. The said Hattenhauer to put in his building for the use of said business free of rent.

Each of said parties to be and become equal half owners of said business, stock, claims and accounts due and owing to said business, and each to be liable for one-half of debts now owing or hereafter to be incurred on account of said business, and all losses from bad debts or otherwise. All help, in addition to said Adamick's services, which may be required, and all debts on account of said business to be first paid.

All net profits as ascertained at the end of said term to be divided equally.

ROBT. C. HATTENHAUER,
GUSTAVE H. ADAMICK."

In addition thereto it was orally agreed that Adamick should, from time to time, draw from the income of the firm such sums as his necessities might require, and that he should report the amount so withdrawn to Hattenhauer monthly, so that Hattenhauer could withdraw an equal amount monthly.

They continued in business from March 1, 1887, until March 1, 1893, when they dissolved, appellant buying out the interest of appellee for \$2,000.

After the lapse of several months appellant claims that he discovered from the books that appellee had withdrawn from the proceeds of the business, before the dissolution, \$1,600 more than appellant had received.

Hence he filed this bill charging fraudulent concealment of that fact and asking an accounting as to the \$1,600.

Appellee admitted that he had withdrawn the \$1,600, but claimed that he was entitled to it by virtue of an agreement in 1890, that he was to receive \$100 per month as salary and appellant \$60 per month store rent. Appellant denied that there was any such agreement made.

If appellee's contention is correct then he was entitled to the \$1,600. There was a sharp conflict in the testimony of the two, but the books seem to corroborate appellee. There was no "doctoring" of the books and nothing said or done by appellee calculated to mislead appellant as to what they showed. They were open to the inspection of appellant. A partner having access to the books of his firm is presumed to know what the state of account of each partner is. 2 Bates on Partnership, Sec. 978.

It is not shown that appellant was charged with anything he did not receive, nor that appellee failed to charge himself with anything he had received. There is no dispute over any entry in the books from the beginning of the business up to the time of the alleged arrangement whereby appellant was to receive \$60 per month rent for his building and appellee was to receive \$100 salary. From that time on appellant was credited in his personal account monthly with \$60 for rent and appellee was credited each month with \$100 as salary. Appellant knew of those entries or should have known them.

The charges of fraudulent concealment made in the bill were not sustained by the proofs, and the bill was properly dismissed for that reason.

If, as a matter of fact, no such arrangement as that contended for by appellee as to rent and salary had been agreed upon, and the books show that he had overdrawn, then the purchase by appellant of appellee's interest in the partnership for \$2,000 extinguished appellee's debt to the firm. *Norman v. Huddleston*, 64 Ill. 11. Decree affirmed.

Alexander Ensminger et al. v. H. J. Horn et al.

70	605
94	389
94	391

1. **REWARDS**—*Parties Claiming Must Have Acted with Knowledge of.*—To every contract there must be mutual assent, and as there can be no assent to that of which a party has never heard, there can be no claim to a reward when the services on which the claim is founded were rendered in ignorance of the reward.

Bill of Interpleader.—Appeal from the Circuit Court of Henry County: the Hon. HIRAM BIGELOW, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

STATEMENT OF THE CASE.

On the night preceding the 4th day of May, 1895, the State Bank of Orion, Henry county, Illinois, was burglarized, and \$4,500 in cash stolen. On the morning of the 4th of May, three men boarded the east bound early passenger train as it passed through Orion, upon the R. I. & P. R. R., paid their fare to different points up the road, and when they arrived in Galva all left the train.

The appearance of the men, their actions and conversation while on the train, and their leaving the train at the same place and before they had reached their destination, caused the conductor to send to headquarters at Rock Island by telegram a report of the occurrence.

The bank officials upon discovering the robbery obtained a description of the three men from H. J. Horn, the conductor, and S. T. Murphy, the baggageman, and offered a reward for the arrest and conviction of the robbers, in the following words and figures which were printed on a postal card and circulated :

“Robbery. \$500 Reward.

ORION, ILL., May 4, 1895.

The State Bank of Orion was robbed by experts last night, the safe was blown open with nitro-glycerine and all the cash taken—\$1,500 gold; \$650 silver, and \$2,350 currency.

Three suspicious characters boarded the early morning train on the R. I. & P. One man heavy set, full face, beard about a week's growth, weight about 185 pounds, brown clothes. One man small and slim, black moustache, thin face, weight about 140 pounds, blue clothes. Third man about six feet two inches, dark moustache, weight about 170 pounds, wore soft fedora hat, long coat, black clothes; carried cheap broken grip that appeared heavy.

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\$500 reward will be paid for the arrest and conviction of the robbers, or a porportionate amount for any one of them, also twenty-five per cent of all money found and returned. By order of the Board of Directors."

During the night preceding Sunday, May 12, 1895, Charles A. May, a policeman, and Alexander Ensminger, a private watchman, arrested three men who were found in a box car at Taylorville, Christian county, Illinois, and confined them in the city prison. On the following morning on going to the prison, Warren R. Eltzroth, the chief of police, found that said prisoners had in their possession a full set of burglars' tools.

Finding the burglars' tools in possession of the men a notice was sent to Chicago and St Louis daily papers. On May 13th the cashier read an account of the arrest and description of the men in the Chicago Tribune and mailed one of the postal cards to the chief of police of Taylorville. Eltzroth wired back that he had the men and to send parties to identify them. On the 16th of May, the sheriff of Henry county, with Horn and Murphy, arrived in Taylorville, and Horn and Murphy identified the prisoners as the men who had boarded their train at Orion on the morning of the 4th of May.

Eltzroth, Ensminger and May, during the time intervening between the arrest of the prisoners and the arrival of Quinn, had sworn out warrants against the prisoners for having burglars' tools in their possession in order to detain them, and had had their photographs taken.

Eltzroth took with him the kit of burglars' tools and the photographs and returned with Quinn and accompanied him and the state's attorney of Henry county to Orion, and upon fitting them to the vault door of the bank they found that the tools were the same as those with which the job was done at Orion.

At the June term, A. D. 1895, of Henry County Circuit Court, the parties arrested at Taylorville, were indicted under the names of Lawrence J. Sullivan, William J. Lawrence and William Monroe and tried, convicted and sen-

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tenced for the robbery of said bank. January 27, 1896, the bill of interpleader was filed to have determined who had earned and was entitled to said reward, and at the October term, A. D. 1896, the court decreed that after the payment of the costs the balance remaining should be equally divided between said Eltzroth, Horn and Murphy, from which decree Eltzroth, Ensminger and May prosecute this appeal.

HAND & HAND, attorneys for appellants; RICKS & CREIGHTON, of counsel.

N. F. ANDERSON, attorney for appellees.

There can be no claim for services when they are rendered in ignorance of the reward. *Chicago & A. R. R. Co. v. Sebring*, 16 Ill. App. 181; *Marvin v. Treat*, 37 Conn. 96; *Clark on Contracts*, 57 and 58.

"To the existence of a contract there must be mutual assent, or in another form of offer and consent to the offer * * * The consent is vital. Without that, there is no contract. How, then, can there be consent or assent to that of which the party has never heard?" *Fitch v. Snedaker*, 38 N. Y. 248.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

Eltzroth contends that he is entitled to the entire reward while Ensminger and May contend that they are entitled to share it with him, and that neither Horn nor Murphy are entitled to any part of it.

A careful examination of the record satisfies us with the judgment of the court below.

All that was done by Ensminger and May up to the time that Horn and Murphy were called upon to go to Taylorville to identify the prisoners, was done in ignorance of the reward. It is a well settled doctrine that there can be no claim for services when they are rendered in ignorance of the reward. The reason of the doctrine is founded upon the principle that to the existence of every contract

Dunn v. O'Mara.

there must be mutual assent. There can be no assent to that of which the party has never heard.

The arrests made by them were in discharge of their duties as a police officer and a watchman. After the identification of the robbers there was nothing done by them toward securing their conviction other than what could have been required of them as witnesses.

Although Horn and Murphy did not know of the robbery and the reward when a description of the three suspicious looking men who boarded the train was furnished, and would not, therefore, be entitled to the reward for that service, yet their going voluntarily to Taylorville to identify the prisoners and the further assistance they gave Eltzroth in fastening the crime upon them were all with the view on their part of sharing in the reward. They co-operated with Eltzroth and were certainly as much entitled to the reward as he was. Judgment affirmed.

Edward A. Dunn v. P. D. O'Mara.

1. REFORMATION—*Of Written Instrument in Equity*.—Where a court of equity is asked to reform a written instrument the chancellor will look beyond the question of whether the parties signing it knew and understood the exact words employed, to the true intention of the parties when they agreed upon the words, and if the instrument does not express the true intention it will be reformed, although there was no mistake in merely writing the words employed. And this rule will apply when the mistake consisted solely of an erroneous mathematical calculation.

Bill, to reform a contract. Appeal from the Circuit Court of Iroquois County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded with directions. Opinion filed June 26, 1897.

ISAAC MILLER HAMILTON, attorney for appellant; PAYSON & KESSLER, of counsel.

Correction of mistakes in any transaction is a principal head of equity jurisdiction. Pool v. Docker, 92 Ill. 501.

The power to correct a mistake in a writing is as much within the scope of the jurisdiction of a court of equity as to correct any other mistake. Parol evidence may be resorted to for the purpose of proving what was the real contract made by the parties. The contract may then be reformed in accordance with the intention of the parties. *Hunter v. Bilyeu*, 30 Ill. 228; *McLennan v. Johnston*, 60 Ill. 306; *Purvines v. Harrison*, 151 Ill. 219; *Way et al. v. Roth et al.*, 159 Ill. 162; *Clearwater v. Kimler*, 43 Ill. 272; *Palmer v. Converse*, 60 Ill. 313.

On full proof of a mistake, an equity arises in favor of the party affected by it, which the court is bound to protect. *Mills et al. v. Lockwood*, 42 Ill. 111.

A court of chancery will correct a written instrument when clearly made to appear that it was entered into and executed under mistake. *McClosky v. McCormick*, 44 Ill. 336; *Snell v. Snell*, 123 Ill. 403; *Lindsey v. Davenport*, 18 Ill. 375; *Kuchenbeiser v. Beckert*, 41 Ill. 172; *Mills v. Lockwood*, 42 Ill. 111.

While the rule in a court of law is, that the written instrument is better evidence of the intention of the parties than can be furnished by parol proof, and that the writing, therefore, in contemplation of law, contains the true agreement of the parties, a court of equity will if justice requires it, look beyond the writing and grant relief from the effect of a contract entered into or founded in mistake or induced by fraud. *Schwass v. Hershey et al.*, 125 Ill. 653.

The instrument sought to be reformed must have been so written as not to state correctly the contract as entered into and understood by the contracting parties. *Hamlon v. Sulivant*, 11 Ill. App. 426.

A mistake of fact is a misapprehension, not as to a result, but as to a condition. 2 Pom. Eq. Jura., 838; 20 Am. and Eng. En. Law, p. 714.

C. W. RAYMOND, FREE P. MORRIS and F. L. HOOPER, attorneys for appellee.

In order that a mistake may come within the cognizance

of a court of equity it must be shown to have been mutual or shared in by both parties. *Sutherland v. Sutherland*, 69 Ill. 481; 1 Story's Eq. Jur., Sec. 150; Fry on Spec. Per., Sec. 505; *Bispham Prin. of Eq.*, Sec. 191; *Emery v. Mohler*, 69 Ill. 221; *Hamlon v. Sullivan*, 11 Brad. 423.

It must have been unintentional on the part of the parties. 15 Am. & Eng. Ency. of Law, bottom page 631 and cases cited.

The party complaining must have used ordinary diligence and acted at the earliest moment. *Bonney v. Stoughton*, 122 Ill. 543; 1 Story's Eq. 146.

The proof must be clear and convincing to make a contract different from what its words import and to add to it and vary it materially.

The strongest and most convincing evidence will be required before the common law rule will be postponed and the power of the court exercised. *Hunter, Adm'r, v. Bilyeu*, 30 Ill. 228; *Shay v. Pettes*, 35 Ill. 360; *McDonald v. Starkey*, 42 Ill. 442; *Miner v. Hess*, 47 Ill. 170; *Chapman v. Hurd*, 67 Ill. 234.

MR. PRESIDING JUSTICE HARKER DELIVERED THE OPINION OF THE COURT.

This was a bill in equity by appellant to reform a contract in writing whereby he agreed to pay to appellee \$1,150 to excavate and construct a certain land drain or ditch. The theory of the bill was that a mutual mistake was made by the parties growing out of an erroneous computation of the cost of the work at the rate of $7\frac{1}{2}$ cents per cubic yard.

The case was referred to the master in chancery for proofs and findings. The master found there was no mistake and the court sustained the finding and dismissed the bill.

A clear preponderance of the evidence shows that the price agreed upon for the construction of the ditch was $7\frac{1}{2}$ cents per yard and that the whole number of cubic yards in it was 7,666.

In making the computation appellant and appellee erroneously found that the ditch would contain $15,333\frac{1}{2}$ yards.

The cost of excavating that number of yards at the rate of $7\frac{1}{2}$ cents per yard would be \$1,150, and when the contract was drawn that amount was inserted as the contract price for construction. That a mistake was made, is quite clear, not in writing in the instrument the words "one thousand one hundred and fifty dollars," because both parties knew the contract contained those words at the time of signing; but the mistake consisted in the belief that 15,333 $\frac{1}{2}$ cubic yards of dirt were to be removed when in truth there were only 7,666 yards to be removed.

It matters not that the parties knew they were signing a contract in which the price was fixed at \$1,150. The question is not, did the parties know what words they used, but rather do the words used express the real intention of the parties?

Where it is sought in equity to reform a written instrument the chancellor will look beyond the question of whether the parties signing it knew and understood the exact words employed to the true intentions of the parties when they agreed upon the words. If the instrument does not express the true intention, although there was no slip of the pen or mistake made in merely writing words, the instrument will be reformed. The mistake here consisted solely of an erroneous mathematical calculation, and authority for correcting it is abundant. *Hunter v. Bilyeu*, 30 Ill. 228; *McClosky v. McCormick*, 44 Ill. 336; *Purvines v. Harrison*, 151 Ill. 219.

The contention of appellee that the two ditches were to be constructed at the price of \$1,450, and that separate written contracts were drawn at the request of appellant is not borne out by the proofs. The testimony of appellee on that point is unreasonable and unworthy of belief.

The decree will be reversed and the cause remanded with directions to grant the relief prayed for in the bill.

William H. Jackson et al. v. Village of Mt. Morris et al.

1. APPELLATE COURT PRACTICE—*Briefs Must be Filed as Required by the Rules.*—On account of the failure of the appellee to file briefs as required by the rules of the court, the decree in this case is reversed *pro forma* under rule 27, and the cause remanded for a rehearing.

Bill, for an injunction. Appeal from the Circuit Court of Ogle County; the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed June 26, 1897.

J. C. SNEYSTER and H. G. KAUFFMAN, attorneys for appellants.

No appearance for appellees.

OPINION PER CURIAM.

This is an appeal from a decree of the Circuit Court dismissing for want of equity a bill filed by appellants to enjoin the construction of a water supply plant under an alleged contract between the president and board of trustees of the village and the pump company.

Appellants have filed briefs in compliance with the rules of this court, but appellees have failed to do so.

We therefore reverse the decree *pro forma*, under rule 27, and remand the case for a rehearing.

Illinois Central Railroad Company v. Artemise S. Ashline, Adm'x.

1. VERDICTS—*On Conflicting Evidence.*—It is the peculiar province of the jury to decide disputed questions of fact on conflicting evidence, and in this case the court holds that the finding of the jury is not so manifestly against the weight of the evidence as to warrant the court in saying they were actuated by passion or prejudice.

2. PLEADING AND EVIDENCE—*Ordinances of a City.*—A declaration

alleged a violation of an ordinance of the city, Sec. 8, Chap. 9, approved March 27, 1888, and on the trial the defendant objected to the introduction of the ordinance. *Held*, that the ordinance was admissible and that defendant should have demurred if he desired to raise the point that the ordinance was not set out with sufficient particularity.

Trespass on the Case.—Death from negligent act. Appeal from the Circuit Court of Kankakee County; the Hon. CHARLES R. STARR, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed June 26, 1897.

W. R. HUNTER, attorney for appellant.

PADDOCK & COOPER, attorneys for appellee.

OPINION PER CURIAM.

This suit was commenced by appellee as administratrix, to recover damages for the killing of her husband, Lawrence Ashline, by a train of appellant on September 4, 1892, in the city of Kankakee.

It was before us at the May term, 1894, on appeal from a judgment recovered by appellee and is reported in 56 Ill. App. 475.

We then reversed the judgment because of erroneous instructions and remanded the case for another trial. This appeal is from a judgment again recovered by appellee, the damages being assessed at \$3,800.

The main contention of appellant is that the verdict is not supported by the evidence.

Whether the accident occurred on the Schuyler avenue crossing of appellant's road; whether the bell on appellant's engine was rung continuously for eighty rods before reaching the crossing as required by statute; whether the deceased was at the time in the exercise of ordinary care for his own safety, and what was the rate of speed of the train were all disputed questions of fact. It is utterly impossible to reconcile the testimony of the various witnesses upon those points. In the conflict it was the peculiar province of the jury to decide those disputed questions. Their findings were not so manifestly against the weight of the evidence as to war-

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rant us in saying that they were actuated by passion or prejudice and that the plaintiff should not recover upon some of the counts in his declaration.

The third count of the declaration charged negligence in running the train at a greater rate of speed than that limited by an ordinance of the city. Sec. 3, Chap. 9. Approved March 27, 1888. When the ordinance was introduced appellant objected. That the objection was overruled and the ordinance admitted to be read, appellant claims was reversible error. We think not. Doubtless the court would have sustained a demurrer to the count, had one been interposed upon the ground that the ordinance was not set out with sufficient particularity, but appellant did not see fit to demur but took issue.

Objection is made to the phraseology of certain instructions given for appellee. While they may be subject to some criticism, the objection to them are so slight as to justify us in saying that they could not have been seriously harmful to appellant. Judgment affirmed.

Hartford Fire Insurance Co. v. W. L. McKenzie.

1. **INSURANCE—Cancellation of Policies.**—Where an insurance policy provides for its cancellation by the company upon a fixed number of days' notice to the insured, the policy remains in force till the company gives the required notice, unless such notice is waived; and if refunding the premium or a portion of it, be one of the terms upon which the company can cancel the policy, there must be such payment, or a tender thereof to the assured or his duly authorized agent before cancellation is accomplished.

2. **SAME—Cancellation of Policies—Return of Premium.**—When an insurance company seeks to cancel a policy under such a stipulation as the one relied on in this case, the insured does not have to tender his policy in order to entitle him to receive back the unearned premium, but it is for the company desiring cancellation to seek the assured and tender the money to him, and till it does so the cancellation has not been effected.

3. **SAME—Policies Can Not be Canceled Without Notice.**—The act of an insurance agent in cancelling a policy on his books, and writing a

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policy in another company and forwarding it as a proposed substitute, is ineffectual to terminate the old policy till notice is given to the assured or his agent.

4. *SAME—Authority of an Insurance Agent.*—It is not within the scope of the authority ordinarily conferred upon an insurance agent to deliver a policy after the property has been destroyed by fire.

5. *SAME—Cancellation, as Affecting other Companies.*—In a suit on an insurance policy providing that it shall be void if the insured has any other insurance on the property covered by the policy, defended on the ground of the existence of other insurance, the question is, what was the condition of such alleged insurance at the time of the fire. After the fire the insured could not give any consent or waive any conditions so as to make good as to the defendant company, an intended cancellation of such insurance which had not been carried into effect when the property was burned.

6. *AGENCY—Contracts Made by an Agent Representing Both Principals Void Until Ratified.*—Where a person who is employed as agent by two principals makes a contract between them, the contract is not binding until approved by both parties with knowledge of the facts.

Assumpsit, on an insurance policy. Appeal from the Circuit Court of Whiteside County; the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the December term, 1896. Reversed. Opinion filed June 26, 1897.

R. W. BARGER, attorney for appellant.

The plaintiff only asked for \$1,500 insurance, and this amount of insurance he had under the Hanover policy, which was in his possession for more than three months at the date of the loss, and which policy was then in full force and effect and uncanceled, and remained in his possession really until June 4, 1895. 1 Woods on Fire Insurance, 288, 290, 291 and 289; 1 May on Insurance, Section 574; Commercial Union Assur. Co. v. State, 15 N. E. Rep. 518, 17 Ins. Law Journal, 333; Hollingsworth v. Germania Fire Ins. Co., 45 Georgia, 294, 12 American Reports, 579; Poor v. Hudson Insurance Co., 9 Ins. Law Jour. 428.

The Hartford policy was not delivered, nor asked for, nor known of, until long after the loss had occurred, and was then delivered as a substitute, and was therefore void. Wilson v. New Hampshire Fire Ins. Co., 5 N. E. Rep. 818; 16 Ins. Law Jour. 408; Stebbins v. Lancashire Ins. Co., 60 New Hampshire, 65; 13 Ins. Law Jour. 698; Lancashire

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Fire Ins. Co. v. Nill (Penn.), 16 Ins. Law Jour. 309; Massasoit Steam Mill Co. v. Western Assurance Co., 125 Mass. 110, 7 Insurance Law Journal, 750; London & Lancashire Fire Ins. Co. v. Turnbull, 86 Ky. 230, 17 Ins. Law Jour. 833.

Even if Mr. Underwood was the agent of Mr. McKenzie, to procure him insurance and to keep him insured, which he was not, then he was the agent of both parties to this alleged contract under the Hartford Fire Insurance policy, and he could not, therefore, make a contract binding on either without the approval of both. Empire State Ins. Co. v. American Central Ins. Co., 34 N. E. Rep. 200; 138 N. Y. 446, 22 Ins. Law Jour. 626; N. Y. Central Ins. Co. v. National Protection Ins. Co., 14 N. Y. 85; 4 Bennett's Fire Insurance Cases, 96.

WHITE & SHELDON and H. C. WARD, attorneys for appellee.

Where an insurance agent is authorized by a person to write insurance upon his property, and to keep it insured, and such agent writes insurance, he may afterward, for the assured, accept notice of cancellation from the company and write the insurance in another company; and in case of fire the latter company will be liable even though the assured has received no notice of the cancellation before the fire and has the policy of the first company in his hands at the time of the fire. Buick v. Mechanics Insurance Co., 61 N. W. Rep. 337; Schauer v. Queen Insurance Co., 60 N. W. Rep. 994; Dibble v. Northern Assurance Co., 37 N. W. Rep. 704; Arnfeld v. Guardian Assurance Co., 34 Atlantic Rep. 530; Germania Fire Insurance Co. v. Shoemaker, 22 Weekly Law Bulletin, 315.

The duties of such an agent to the insurance company and to the insured are in no sense repugnant. Schauer v. Queen Insurance Co., *supra*; Stone v. Franklin Insurance Co., 12 N. E. Rep. 45.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

This was a suit upon an insurance policy brought by McKenzie against the Hartford Fire Insurance Company

to recover for the destruction by fire of a mill and machinery therein at Tampico, Whiteside county. The declaration contained a special count on the policy and the common counts, and defendant pleaded the general issue. There was a verdict and judgment for the plaintiff, and defendant prosecutes this appeal therefrom.

The Hartford policy was dated April 18, 1895. The fire occurred April 19, 1895, at seven o'clock P. M. McKenzie had never personally applied or paid for any insurance in the Hartford company, and at the time of the fire he had no knowledge that any such application had been made or any such policy made out. At the time of the fire the Hartford policy was in the office of Underwood & Co., insurance agents at Sterling, and in an incomplete condition, and McKenzie then held a policy in the Hanover Insurance Company, insuring the same property from December 28, 1894, to December 28, 1895, for which he had paid a premium of \$45. The amount insured by each policy was \$1,500, and McKenzie had never applied for more than \$1,500 insurance. He supposed he was insured in the Hanover, and had never heard the Hartford mentioned in connection with his property till the day after the fire. The Hartford policy contained the following stipulation: "This entire policy * * * shall be void if the insured now has * * * any other contract of insurance, whether valid or not, on property covered in whole or in part by this policy." The Hartford company claims that the Hanover policy was in force at the time of the fire, and that by reason of the foregoing stipulation the Hartford policy was void. It also claims that the Hartford policy had not been delivered when the property burned.

The Hanover policy had been duly issued and paid for, and was in the possession of the assured, and was relied upon by him at the time of the fire; and it was then in force unless it had been duly canceled. That policy contained this stipulation: "This policy shall be canceled at the request of the insured, or by the company, by giving five days' notice of such cancellation. If this policy shall

be canceled as hereinafter provided, or become void, or cease, the premium having been actually paid, the unearned portion shall be returned on surrender of this policy or last renewal, this company retaining the customary short rate; except that when this policy is canceled by this company by giving notice it shall retain only the *pro rata* premium." Where there is in an insurance policy such provision for the cancellation of the policy by the company upon a fixed number of days' notice to the insured, the policy remains in force till the company gives the required notice, unless such notice is waived. If refunding the premium, or a portion of it, be one of the terms upon which the company can cancel the policy, there must be such payment, or a tender thereof, to the assured or his duly authorized agent before cancellation is accomplished. 2 Beach on Insurance, Sec. 628; May on Insurance, Secs. 67, 69, 574; 1 Wood on Insurance, Sec. 113; Mallory v. Ohio Farmers Ins. Co., 90 Mich. 112. Where the company seeks to cancel the contract under such stipulation as is above set out, the insured does not have to tender his policy in order to entitle him to receive back the unearned premium, but it is for the company desiring cancellation to seek the assured and tender the money to him, and till it does so the cancellation has not been effected. Peoria M. & F. Ins. v. Botto, 47 Ill. 516; Ætna Ins. Co. v. Maguire, 51 Ill. 342; 1 Wood on Insurance, Sec. 113; 2 Beach on Insurance, Sec. 527.

The material inquiry is whether, within the rules above stated, the Hanover Insurance Company had canceled its policy upon appellee's property before it was destroyed by fire. Underwood & Co., of Sterling were agents for about twenty insurance companies, including the Hanover and the Hartford. They had written the Hanover policy on McKenzie's property. On April 17, 1895, Underwood received notice from the Hanover company that it desired to cancel this policy. He took no action thereon till the evening of April 18th, when he noted on the Hanover register in his office that the policy was canceled, partially made out a daily report to the Hartford company, showing

the property insured in that company for \$1,500 from April 18, 1895, to April 18, 1896, stating amount, premium and rate, and directed his clerk to complete the report and mail it to the Hartford office in Chicago next day. Underwood also wrote a letter the evening of the 18th to Pierce (who solicited insurance for him at Tampico, and who had procured this insurance for him), telling him of the cancellation of the Hanover policy and of the reinsurance in the Hartford, and asking Pierce to get the Hanover policy from McKenzie. Pierce received this letter on the 19th, a short time before the fire, and he did not notify McKenzie of it until the day after the fire. Underwood, also on the evening of the 18th, signed a blank policy in the Hartford (being the policy here sued on), and directed his clerk to fill that out the next day with the insurance for McKenzie, intending to complete and attend to the policy himself on the 20th. Underwood, also on the evening of the 18th, credited the Hartford company with one year's premium on the policy as paid by McKenzie, and in the private account of McKenzie with Underwood & Co. charged McKenzie with one year's premium in the Hartford and credited him with the unearned premium under the Hanover policy, thus, so far as mere bookkeeping could do it, paying the premium to the Hartford company and making McKenzie the debtor of Underwood & Co., for the difference between the premium in the Hartford and the unearned premium in the Hanover. Underwood went to Chicago on the morning of the 19th and returned to Sterling at nine p. m., the same day, two hours after the fire. He found the new policy incomplete in not having the gasoline permit attached, which was essential, as the mill was operated by a gasoline engine, and the agent knew it. On the morning of April 20th, but before he heard of the fire, he attached that permit and completed the policy. At the time of the fire, no notice had been served upon McKenzie that the Hanover company had elected to cancel its policy, and the unearned premium had not been paid or tendered to him. He had not in any way waived compliance by the company

with the stipulations of the policy in regard to cancellation. We think it is clear no cancellation of the Hanover policy was effected by virtue of the facts above stated.

It is insisted McKenzie had made Underwood his agent, and that by virtue of the authority McKenzie had given him Underwood could accept notice and could waive notice of the cancellation, and had authority to procure new insurance for McKenzie, and that notice to Underwood was therefore notice to McKenzie; that the acts of Underwood in entering a cancellation of the old policy on the Hanover register, in issuing a new policy in the Hartford, and in crediting McKenzie with the Hartford policy as paid, were binding upon McKenzie as the acts of his agent, and that by those acts, Underwood, for McKenzie, consented to immediate cancellation, waived the five days' notice and received the unearned premium, and therefore the Hanover policy was duly canceled on the 18th, and the policy in the Hartford was valid. This contention rests upon the conversation between Underwood and McKenzie in the presence of Pierce at Tampico, when McKenzie first ordered insurance on this property. These three men were examined several times at the trial as to what was said on this subject in that conversation. To here repeat their testimony would unduly extend the limits of this opinion. We have carefully examined and considered it, and are of opinion it does not warrant the conclusion that Underwood had any authority to act for or represent McKenzie in any respect in regard to the cancellation of any policy. In this conversation at Tampico, Underwood told McKenzie the risk was hazardous and undesirable; that many companies would refuse to carry it; that before he could bind any company upon it he would have to consult such company; that he would submit the application to one company and if it refused to insure he would submit it to another, and so on till, if possible, he got some company to carry it; and that if he got some company to issue a policy and that company should afterward cancel it, as sometimes occurred, then he would try to put McKenzie in another company. McKenzie testifies he then

told Underwood that if the company which did insure him should cancel the policy, to write him up in another company and he would pay whatever it cost. Underwood and McKenzie had never done business with each other before. They were introduced to each other at the time of this conversation. They had but this one transaction. Nothing was said between them to the effect that if any company wished to cancel a policy on this property, Underwood should or could act for McKenzie, or receive or waive notice. The most that can be said is that if a policy was canceled, Underwood had directions to try to get McKenzie insured in some other company. His authority did not include the cancellation. He was not authorized to do, suffer or consent to any act in regard to cancellation, but only to act after cancellation had been effected. In this respect this case differs from the cases cited by appellant. In this case, therefore, nothing had been done by the Hanover company at the time of the fire toward cancellation. The determination of officers of that company at the home office to cancel the policy, accomplished nothing toward that end. Their letter to their own agent telling him they desired to cancel the policy was not a compliance with any part of the stipulations relating to cancellation embodied in the policy. The Hanover company gave McKenzie no notice. It tendered him no unearned premium. Indeed it could not have canceled the policy and escaped liability after its officers wrote to their agent, for the fire occurred less than five days thereafter.

It is argued, these stipulations as to cancellation were for the benefit of McKenzie only, and were not available to the Hartford company, and that if McKenzie afterward chose to waive these conditions and treat the Hanover policy as canceled, the Hartford company could not be heard to complain thereof. The real question is, what was the condition of the insurance at the time of the fire; had the Hanover policy then been canceled? Neither party could afterward change the conditions existing at the time of the fire so as to afterward create a liability by the opposite

party where none existed at the moment of the fire. At any time before the fire McKenzie could have waived each and every of these conditions, and consented to treat the Hanover policy as canceled. But by the fire and the acts of Underwood, the Hartford company became interested in the question whether the Hanover policy had been canceled before the fire. That question was to be determined by the facts as they then existed—by what had theretofore been done. McKenzie could not, two days later, at Sterling, give any consent, or waive any conditions, so as to then make good an intended cancellation which had not been carried into effect when the property was burned. We are of opinion the Hanover company had taken no steps to comply with the stipulations of its policy as to cancellation, and that there had been no waiver of those conditions, when the fire occurred, and that the Hanover policy was then in full force, and that because it was in force, the Hartford policy was void by virtue of its own provisions above recited. We also hold that at the time Underwood made the notations for the Hartford policy, and signed the policy in blank, and undertook to so transfer debits and credits as to pay the Hartford company for its policy, he was acting without authority from McKenzie, and that the Hartford policy had not been ordered, and was not paid for or delivered. The transaction between Underwood and McKenzie at Sterling two days after the fire, when Underwood persuaded McKenzie the Hanover policy had been canceled, and the Hartford company was liable to him for the loss, and McKenzie gave up the Hanover policy and took the Hartford policy, can not avail here to determine which policy was in force at the time of the fire. It is not within the scope of the authority ordinarily conferred upon an insurance agent to deliver a policy after the property has been destroyed by fire. The act of an insurance agent in canceling a policy on his books, and writing a policy in another company and forwarding it as a proposed substitute, is ineffectual to terminate the old policy till notice to the insured or his agent. *Stebbins v.*

Lancashire Ins. Co., 60 N. H. 65; *Massasoit Steam Mills v. Western Assurance Co.*, 125 Mass. 111; *Wilson v. N. H. Fire Ins. Co. (Mass.)*, 5 N. E. Rep. 818.

But if it were established Underwood was the agent of McKenzie to accept or waive notice of cancellation and to reinsure, still we are of opinion that under the special facts of the case the Hartford company would not be bound. Underwood would then be the agent both of McKenzie and the Hartford company. The property was hazardous—was such a risk as many companies would refuse—and Underwood knew it. He had told McKenzie in December, that before he could bind any company on it he would have to consult its officers. He did not think it best to write a policy at first, but prepared an application and forwarded it to one company, and it was rejected; then he sent an application to a second company, and it also was rejected; then he wrote a policy in the Hanover, but did not deliver it till he got word that it was accepted. Now the Hanover had written that it desired its policy canceled. Thereupon Underwood wrote, or partially wrote, the Hartford policy here sued on, and notified that company of the details of the policy, but not of the existence and attempted cancellation of the Hanover policy. We are of opinion that if he was the agent both of McKenzie and the Hartford company, as here contended, then the contract he so attempted to make between them was not binding till approved by both parties with knowledge of the facts. *London & L. F. Ins. Co. v. Turnbull*, 86 Ky. 230; *Empire S. Ins. Co. v. Am. Cent. Ins. Co.*, 138 N. Y. 446.

Instruction numbered 1 $\frac{1}{2}$ offered by defendant, stated the law on this subject correctly, and it was error to refuse it.

Other defenses against this policy are argued, but their consideration is rendered unnecessary by the conclusions already reached. Under the evidence the court is of opinion appellee has no cause of action against the Hartford company, and the judgment of the court below is therefore reversed.

Finding of facts to be embodied in the judgment:

The court finds that the policy sued upon was not ordered or paid for by, or delivered to, plaintiff before the destruction of the property by fire; that plaintiff at the time of the fire had no knowledge of any steps taken to insure him in the appellant company; that the policy sued upon had not been completed at the time of the fire; that at the time of the fire appellee had in his possession a policy of insurance upon said property in the Hanover Insurance Company, upon which alone he relied as his security against loss by fire; that he had never been notified of any purpose by the Hanover company to cancel said policy; that there was then unearned premium theretofore paid by appellee upon said Hanover policy which had not been returned to him at the time of the fire; that the stipulation for cancellation contained in said Hanover policy had not been complied with at the time of the fire; and that Underwood was not the agent or representative of appellee in any matter relating to the cancellation of the Hanover policy.

Henry Gross v. Fred Schroeder.

1. **LANDLORD AND TENANT—*Right of Landlord to Distrain.***—The evidence in this case clearly establishes that appellee removed, without his landlord's consent, a sufficient portion of the crops raised on the demised premises to endanger the lien of the landlord, and under the provisions of the statute the landlord was entitled to recover the amount of rent unpaid, by distress proceedings.

2. **CONTRACTS—*Complete Performance Essential to Recovery in this Case.***—The contract relied upon as a set-off in this case was not severable and appellee could not demand payment of the fifty dollars provided for therein without showing his entire and complete compliance with that contract.

Distress for Rent.—Appeal from the Circuit Court of Will County; the Hon. GEO. W. STIPP, Judge, presiding. Heard in this court at the December term, 1896. Reversed and remanded. Opinion filed June 26, 1897.

HALEY & O'DONNELL, attorneys for appellant.

JOHN W. D'ARCY, attorney for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

Appellant, being the landlord of the appellee, instituted proceedings by distress against the latter in the court below for a balance of rent, and in the distress warrant which stands as the declaration, it is alleged in substance that the tenant had or was about to remove from the demised premises, such part or portion of the crops raised thereon as would endanger the lien of the landlord upon such crops for the rent agreed to be paid. It also appears from the evidence that in his attempt to collect rent from the tenant some controversy arose between the landlord and tenant concerning a mutually satisfactory disposition of the crops, that finally terminated in the following written undertaking by the appellant:

"MONEE, ILL., Nov. 19, 1894.

I hereby agree to pay to the order of Fred C. Schroeder the sum of fifty dollars, as soon as he shall have husked the corn and placed the same in crib now standing and partly husked on my farm occupied by the said F. C. Schroeder, and also after he has hauled all the oats grown by him on my farm to and delivered at elevator of G. S. Miller, in Monee, Ill.

H. GROSS."

The trial in the Circuit Court was by jury, the verdict being for the defendant. Plaintiff below moved for a new trial, which having been overruled, final judgment was entered from which this appeal was taken.

We are of the opinion the evidence clearly establishes the fact that appellee did, without the consent of his landlord, remove and sell such part or portion of the crops raised on the demised premises as did endanger the lien of the appellant for the rent agreed to be paid. The testimony of appellee himself proves this fact, and under the provisions of the statute the appellant was entitled to recover the amount of rent admitted to be unpaid. In this respect we think the verdict was against the evidence in the case, and a new trial should have been awarded.

The court on its own motion gave to the jury the following instruction, based upon the undertaking above quoted:

"The court instructs the jury that the defendant can not be allowed the alleged set-off of \$50 unless he has shown by the evidence that he fully complied with the terms of the agreement by which he was to receive said \$50; that is, husk the corn then partly husked and haul all the oats raised upon said farm of plaintiff for the year 1894, but the jury may allow to the defendant such proportion of said \$50 as the evidence shows the defendant has performed of the work named in said contract, and which the plaintiff has received the benefit of, if the evidence shows any such."

This instruction we think is contradictory in its terms; the first part of it correctly states the law as we understand it, but the last part is opposed to the first and nullifies it. If the appellee could not be allowed the \$50 unless he fully complied with the terms of his agreement, as we think he was bound to do, and as the instruction correctly stated, it is difficult to see how he could be allowed a part of the \$50 for an incomplete performance of the contract, as the instruction also clearly informs the jury.

For the errors indicated, the judgment of the Circuit Court will be reversed and the cause remanded.

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The Travelers Insurance Company v. Clara P. Mayo.

1. **MERGER—Deficiency Decree in Foreclosure Proceedings**—Where a plaintiff files a bill to foreclose a mortgage securing notes on which the defendants are liable jointly and severally, and after a sale of the mortgaged premises elects to take a deficiency decree against only one of the defendants, the judgment is a merger of the whole cause of action against all the defendants, and a subsequent suit can not be maintained against any one of them.

2. **PROMISSORY NOTES—Suits Against a Surety**.—The fact that one of the signers of a note is a security, does not make him any the less liable jointly with the principal, and any suit at law on the note should be against the signers jointly and not against the surety in the capacity of indorser after pursuit of the principal to insolvency.

Assumpsit, on a promissory note. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed July 1, 1897.

ALEXANDER CLARK and C. W. BROWN, attorneys for appellant.

GARNSEY & KNOX, attorneys for appellee.

MR JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was a suit in assumpsit, seeking recovery on a joint and several promissory note given by R. G. Mayo and his wife, the appellee, executed in the State of Florida, June 15, 1888, for \$5,000 with twelve per cent interest after maturity and due in two years.

The note was payable at the appellant's office, at Hartford, Connecticut, with exchange on New York. This suit was commenced in attachment against both signers of the note, and the writ levied on the real estate of appellee.

She then filed pleas alleging her coverture, and that by the laws of Florida, a married woman, was not liable on a promissory note. The suit was dismissed as to R. G. Mayo and additional counts filed, Nos. 5 and 6, attempting to charge appellee as guarantor.

The appellee then filed her fourth plea, setting up the execution of the note and mortgage on the real estate in the State of Florida; that the same was foreclosed in the Circuit Court in Orange county, State of Florida, and a decree of sale of foreclosure entered by said court, and the real estate sold, for a certain sum bid, leaving a deficiency of \$4,891.10, and that judgment was rendered in said court for said deficiency against the said R. G. Mayo alone, although appellee was duly served and said court had jurisdiction of her and the said Mayo, and said judgment was rendered on the said note being the same cause of action sued on in this case, and claimed that the said note was merged in said judgment, and that the same was a bar to this action against her.

The appellant then filed its seventh count setting up as cause of action, the same facts and seeking recovery on the deficiency decree.

The court below sustained demurrer to said seventh count

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and overruled it to the fourth plea. The cause was submitted to the court the appellant abiding by his demurrer to said fourth plea, and the court rendered judgment against appellant for costs, from which judgment this appeal is taken.

The errors assigned are that the court erred in overruling the demurrer of the appellant to the fourth plea, and in sustaining the demurrer to the seventh count of the declaration.

The only question to be passed upon by this court is whether the said deficiency decree rendered by the Florida court against R. G. Mayo alone, was an extinguishment of the cause of action against appellee as well as R. G. Mayo. It is not disputed that a judgment or decree against one of two joint principals releases the other, and this rule appears to be fully established and recognized in *Lawrence v. Beecher*, 116 Ind. 312. (19 N. E. R. 143.) The case cited holds that where there is a deficiency decree against one of several makers of a promissory note, and no disposition of the case as to the others is directly made further than to decree that their equity of redemption is barred, the cause of action is barred in a subsequent suit on the note against those not included in the deficiency decree. It would not be the case however where there was simply a decree of foreclosure but a subsequent deficiency decree is in its effect a personal judgment on the note, and where the court has jurisdiction against all the several makers and only renders judgment against one this extinguishes his cause of action against the others.

The court also further holds that even where the note was joint and several, and where each might be sued severally, yet where all are sued as joint makers and judgment is taken against one, the other makers by this action are released. The case might be different if the court had dismissed the suit against those not sought to be held in such manner as to make it a several action against each of the makers before final judgment against one. In a case like the *Indiana* case, where a deficiency judgment was taken against one of sev-

eral makers of a promissory note and no other disposition made by the court as to the others, the cause of action is merged in the judgment and those against whom no judgment is taken are released.

The appellant seeks to evade the force of the rule, correctly announced, as we think, in the case cited, by the fact set out in the fourth plea that appellee, while she signed the note as a joint maker, was in fact security for Rudolph P. Mayo, her husband, and that therefore her husband might be pursued to final judgment or decree without releasing her, though the court had jurisdiction of her person the same as that of her husband.

This contention is based on the supposed ground that she was only secondarily liable and that the principal, especially in equity, should be pursued to insolvency before the liability of the surety should attach, and therefore she is not released by the action of the court in the foreclosure and deficiency decree in the Florida case.

The fact that appellee was security did not make her any the less liable jointly with the principal, and this was the position she occupied, and any suit at law brought on the note should have been against both jointly and not against appellee in the capacity of indorser after having pursued the principal to insolvency showing a suit for that purpose to be unavailing, and not as a guarantor.

She occupied the position of principal and joint maker. It is true she was security and would be in law and in equity so considered in any equitable defense she should make. If no rights of appellee as security had been violated by the payee she had no defense and must answer as principal. The following cases will illustrate. *Rodgers v. School Trustees*, 46 Ill. 428; *Lincoln v. Hinzey*, 51 Ill. 435.

The following rule is laid down in *Lawrence v. Beecher*, 116 Ind., *supra*: "Where a plaintiff voluntarily elects to take a personal judgment against one of a number of defendants severally liable, without in any way preserving his rights against others then equally liable before the court, the presumption is that he is content with the judgment and

that his contentment is due to the fact that he received at the hands of the court all the relief that he was justly entitled to receive. If he desires to prevent this result he must take some steps as he well may to counteract this presumption. If he takes no such steps, but elects to take a final judgment against one of the defendants and takes only a judgment of foreclosure against the others, he can not justly complain if this presumption prevails against him, since he must be deemed to have obtained all the relief to which equity and justice entitled him." The plaintiff should not be allowed "to disturb the courts and vex the parties with many actions."

If appellee were security in this case, and the court had full jurisdiction as it had of her person and subject-matter of the suit and that of the principal, and entered a final deficiency decree, without dismissing the bill against her without prejudice against the principal, the presumption would be that on account of her securityship and some violation of her rights by the appellant as such, she was released, or that he voluntarily released her.

It may be that if appellant had taken some secondary relief in his decree against appellee, whether rightfully or wrongfully, she would have been bound by it and liable according to its terms.

But no such action was taken. The finding of the Florida court was, in effect, in her favor, and by its decree appellant must abide. We can see no substantial difference in appellant's favor, as claimed by his counsel, between this case and the Indiana case above cited. Seeing no error in the record, the judgment of the court below is affirmed.

Wm. A. McCune, Assignee, v. The American Screw Co.
et al.

70	631
170s	622
70	631
87	163

1. VOLUNTARY ASSIGNMENTS—*Are Chancery Proceedings*.—A proceeding in a County Court, under the act relating to assignments by insolvent debtors, is not a purely statutory proceeding, but is a chancery proceeding, modified and regulated by statute. It is a suit in

chancery, within the meaning of the statute relating to Appellate Courts.

2. *APPEALS—From the County Court in Insolvency Proceedings.*—An appeal from a final order or decree of a County Court, in the administration of an insolvent estate, under a general assignment for the benefit of creditors, goes to the Appellate and not to the Circuit Court.

3. *SAME—Final Orders.*—An order of a County Court in assignment proceedings, which finally settles the right to have certain disputed assets of the insolvent charged to the assignee, is a final order, within the meaning of the statute in regard to appeals.

Assignment Proceedings.—Appeal from the Circuit Court of Whiteside County; the Hon. J. C. GARVER, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed July 1, 1897.

C. L. SHELDON, attorney for appellant.

JOHN W. ALEXANDER, attorney for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an appeal from the County Court to the Circuit Court from an order of the County Court sustaining certain objections to the final report of appellant as assignee, under the insolvent debtor's act, of the Novelty Manufacturing Co., made by the appellee a creditor of the insolvent.

On March 6, 1896, the court, after sustaining certain objections made by appellee to the final report of the appellant, ordered the latter to file another report under oath charging himself with various items stated.

From this order the appellant prayed an appeal to the Circuit Court of Whiteside County, which was allowed and perfected. On motion of appellee made in the Circuit Court to dismiss the appeal the same was dismissed by the court. The ground on which the appeal was dismissed was, that it was not properly taken to the Circuit Court but should have been taken directly to the Appellate Court.

From this order of dismissal this appeal is taken to this court, and a reversal of the order of the Circuit Court dismissing such appeal from the County Court asked.

The question is presented whether or not an appeal lies

from an order of the County Court to the Circuit Court in charging an assignee on hearing of his final report with moneys he claims he should not be charged with, or must an appeal be taken to the Appellate Court in the first instance.

It is conceded that if this proceeding is in its nature a chancery proceeding in the County Court, then under Sec. 8, Chap. 37, R. S., the appeal lies directly to the Appellate Court, provided the order appealed from was a final order. We are of opinion the order of the County Court was a final order. It settled finally the right to have certain disputed assets of the insolvent charged up against appellant the assignee, and as to them the order was final.

As to whether this was a chancery proceeding, we think the question well settled by the Supreme Court in the following cases, which we refer to for a full exposition of the law on the point in question, to wit: *Union Trust Company v. Trumbull et al.*, 137 Ill. 156; *Lee v. People ex rel.*, 140 Ill. 536; *Levy v. Chicago National Bank*, 158 Ill. 88.

In the latter case it was expressly held that a voluntary assignment for the benefit of creditors at common law created a trust in the assignee and was a subject of equitable jurisdiction, and that "the trust in behalf of creditors by virtue of a voluntary assignment is no less a subject of equitable cognizance since the enactment of this statute than it was before its enactment, and hence, if no tribunal had been named for the enforcement of the provisions of this statute it would have devolved upon a court of chancery to do so. The proceeding is not a statutory proceeding but a chancery proceeding modified and regulated by statute."

The court further held that the fact that the statute conferred jurisdiction on the County Court to administer the subject-matter of the assignment did not change the nature of the proceeding, but that it remained a chancery suit in the County Court.

We regard the question fully settled by the above cases, and it is not necessary that the proceedings in the County Court,

as to pleadings, should conform to those in chancery to make this a chancery proceeding, as supposed by appellant's counsel.

It is enough if the County Court, according to the practice in that court, is exercising equity jurisdiction.

The case of *Grier v. Cable*, 159 Ill. 32, is not in point, as that was a case of the presentation and allowance of claims against an insolvent estate, and was purely a statutory proceeding.

The order appealed from was one settling the rights of creditors in a final report of the assignee, and was in the nature of a final decree in chancery against the assignee as to how much he should be required to pay the creditors and how much he owed the estate of the insolvent, and was as much of a proceeding in chancery as any part of the proceeding and was in its nature final on that question.

As all orders made by the County Court in its administration of the insolvent's estate would be in the exercise of its chancery jurisdiction, even interlocutory orders could not be appealed from to the Circuit Court. Seeing no error in the record, the order of the Circuit Court dismissing the appeal is affirmed.

The People of the State of Illinois ex rel. Sarah Sullivan v. Jesse Johnson.

1. **EVIDENCE—*Opinions as to Period of Gestation in Bastardy Cases.***—In a bastardy case, turning upon the question whether a child had seen the full, or natural period of gestation, a physician professing to be informed on the subject may be allowed to give his opinion on the question involved, the opinion being based on the appearance of the child at the age of thirteen months.

2. **SAME—*Foundation for Hypothetical Questions.***—Whether the expert evidence introduced establishes the facts upon which hypothetical questions are based, is for the jury, and if it tends to do so, it is proper to allow the questions to be asked.

3. **SAME—*As to Length of Period of Gestation in Bastardy Cases.***—In a bastardy case, turning upon the question whether more than seven

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months had elapsed between the act of connection and the birth of the child, an expert witness may be allowed to testify that in case the child in question had been a seven months' child, and had been treated at its birth in the manner the evidence showed, the chances for its survival would have been small.

4. *ERROR—As to Admission of Evidence as Ground for Reversal.*—Where the great preponderance of the evidence was in favor of the appellee, a slight error in the admission or rejection of evidence is not sufficient cause for a reversal of the judgment.

Bastardy.—Appeal from the County Court of La Salle County: the Hon. HENRY W. JOHNSON, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed July 1, 1897.

V. J. DUNCAN, State's attorney, and HALL & HAIGHT, attorneys for appellants.

"Medical men, when called as scientific witnesses, can not give their opinion as to the merits of the cause, but their opinions must be predicated upon facts proved." Pyle et al. v. Pyle et al., Vol. 41 Northeastern Reporter, 999; Chicago & Alton Ry. Co. et al. v. The Springfield & N. W. Ry. Co., 67 Ill. 142; C., R. I. & P. Ry. Co. v. Moffitt, 75 Ill. 524, Sec. 1; Greenleaf on Evidence, Sec. 440; Louisville, New Albany & Chicago Ry. Co. v. Shires, Adm., 108 Ill. 617; Schneider et al. v. Manning et al., 121 Ill. 376; Henry v. Hall, 13 Ill. App. 343; Hoerner v. Koch et al., 84 Ill. 408.

TRAINOR & BROWNE, attorneys for appellee.

"On questions of science, skill or trade, or others of the like kind, persons of skill, sometimes called experts, may not only testify to facts, but are permitted to give their opinions in evidence. Thus, the opinions of medical men are constantly admitted as to the cause of disease, or of death, or the consequence of wounds, and as to the sane or insane state of a person's mind, as collected from a number of circumstances of professional skill, and such opinions are admissible in evidence, though the witness founds them, not on his own personal observation, but on the case itself, as proved by other witnesses on the trial." 1 Greenleaf on

Evidence, Sec. 440; Starkie's Evidence, 154; Schneider et al. v. Manning et al., 121 Ill. 387; O. & M. Ry. Co. v. Webb, 142 Ill. 404; O. & M. Ry. Co. v. Neutzel, 143 Ill. 46; Natl. G. & F. Co. v. Miethke, 35 Ill. App. 629.

The party seeking an opinion of an effect, may, within reasonable limits, put his case hypothetically as he claims it to have been proved, and take the opinion of the witness therein, leaving the jury to determine whether the case as put is the one proved. Am. & Eng. Ency. of L., Vol. 7, p. 514, citing long line of State decisions; McFall v. Smith, 32 Ill. App. 472.

"The claim is that a hypothetical question may not be put to an expert, unless it states the facts as they exist. It is manifest, if this is the rule, that in a trial where there is a dispute as to the facts, which can be settled only by the jury, there would be no room for a hypothetical question. The very meaning of the word " (hypothetical) "is that it supposes, assumes something for the time being. Each side, in an issue of facts, has its theory of what is the true state of facts, and assumes that it can prove it to be so to the satisfaction of the jury, and so assuming shapes hypothetical questions to experts accordingly." Cowley v. People, 83 N. Y. 464; Erickson v. Smith, 2 Abb. App. Dec. (N. Y.) 64; People v. Lake, 12 N. Y. 358; Seymour v. Fellows, 77 N. Y. 178; Guiterman v. Liverpool Oc. N. Y. & P. S. Co., 83 N. Y. 359, 364.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

This was an action at the complaint of Sarah E. Sullivan, an unmarried woman, charging appellee Jesse Johnson with being the father of her bastard child.

The parents of the parties were farmers, living in Allen township, LaSalle county, Illinois, and were Norwegians.

The case of the appellant rests upon her unsupported evidence as to the act of copulation between her and appellee, which she claims caused her pregnancy, and, as she testified, took place on the night of July 21, A. D. 1894, at the home of one of their neighbors, named Hegaland, where

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appellee and Miss Sullivan were guests. The child was born February 24, 1895, and it is claimed by appellant that the pregnancy took place on the 21st July, 1894, as a result of the act of copulation, said to have taken place at the time alleged.

It is also claimed that one other act of sexual intercourse took place between Sarah E. Sullivan and appellee in October, 1894, at the complaining witness' father's residence, in the barn.

These are the only two acts of sexual intercourse that ever took place between them, according to the testimony of the complaining witness.

The case of appellant rests entirely on the unsupported evidence of Sarah E. Sullivan, and is contradicted by the evidence of appellee, who testified that he never had had sexual intercourse with her at any time, or with any other woman, and had never made any propositions or advances to her with that end in view. Appellee was about twenty-two years old at the time and the complaining witness about thirty years old.

Prior to the fifth day of July, 1894, the complaining witness had been residing in Minnesota with relatives for some six months, and had then returned to her father's home in La Salle county, Illinois.

The appellee was corroborated by the facts and circumstances shown in evidence and by the evidence of medical experts, tending to show that from the testimony given and the appearance of the child at the birth, as testified to by the attending physician, it had seen the full period of 285 days, the natural period of gestation, and could not have been born 218 days from the period of conception, which it must have been, if the complaining witness' testimony was true.

There was other evidence corroborating appellee's testimony, in whose favor the jury returned a verdict, finding appellee not to be the father of the child.

The evidence was abundant to sustain the verdict of the jury, and it is not even insisted by counsel for appellant that the verdict was against the weight of the evidence.

It is complained that the court below erred in admitting certain evidence of experts on the question as to whether the child was a nine months' child or the reverse.

And one of the points is that Dr. Hathaway was allowed to testify as to whether the child was in his opinion a nine months' uterine child, or about that old at the time of its birth; this judgment being based on the appearance of the child as he saw it running about in the court room. The child was not introduced in evidence before the jury and we see no reason why the doctor could not be allowed to testify as to his opinion, judging from the development of the child at the time, as he professed to be able to do. The child was then thirteen months old.

It is complained that other of the expert testimony as to the period of gestation of the child was not based on the evidence.

In answer to this objection we may say that appellee insisted that the expert evidence tended to establish the facts upon which the hypothetical questions were based, and whether it did so or not was a proper question for the jury. It was proper therefore for the court to allow the questions to be propounded by appellee's counsel to the witnesses, taking care not to allow the questions to be so framed as to mislead the jury.

It is also objected that an expert witness was allowed to testify, in substance, that in case the child in question had been a seven months' child and had been treated in the same manner as the evidence tended to show this one was cared for at its birth, the chances of its survival would have been greatly against it. The object of this testimony was to show this fact bearing on the disputed question as to whether the child was a nine months' child, as claimed by appellee, and hence he is not guilty.

We see no reversible error in this ruling of the court.

In view of the fact that the great preponderance of the evidence was in favor of the appellee, no slight error of the court, if any were made in the admission or rejection of evidence, would be sufficient cause for reversal.

David Bradley Mfg. Co. v. Raynor.

Some complaint is made as to the giving and refusing of instructions, but after a careful examination we are of the opinion that the jury was fairly and properly instructed and could not have been misled.

The judgment of the court below is therefore affirmed.

David Bradley Manufacturing Company v. Lansing J. Raynor, Receiver.

1. *CONTRACTS—Whether Sales or Bailments.*—A contract provided that the consignee should pay for goods to be delivered “as per prices and terms annexed to said goods,” and that the consignor should carry “all goods remaining unsold.” *Held*, that the contract was a sale and not a bailment.

2. *SAME—Whether Sales or Bailments—The Rule Stated.*—Where there is no obligation to return an article, the party receiving it being at liberty to return another thing of equal value, he becomes a debtor to make a return, and the title to the property is changed—it is a sale.

Petition, in assignment proceeding. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed July 1, 1897.

EGBERT PHELPS, attorney for appellant.

GEORGE S. HOUSE, attorney for appellee.

MR. JUSTICE LACEY DELIVERED THE OPINION OF THE COURT.

The appellant intervened by petition to compel appellee as receiver of the Joliet Strowbridge Company to turn over to it certain farming implements held by it, claiming that the goods in question were put into the possession of the insolvent Joliet Strowbridge Company before insolvency and while it was conducting a retail business in farm implements as its agent, for sale, and not as purchaser; that the Joliet Strowbridge Company, as to the goods in question, was the bailee of appellant, and that the title to the goods remained

in the appellant and was not in the consignee, which afterward became insolvent, and was put in the hands of appellee as receiver by order of the Circuit Court in chancery.

The amount of the goods in the aggregate claimed is \$1,115.70.

The decision of the case hinges on the proper construction of two contracts between the appellant and the said Joliet Strowbridge Company of 1894 and 1895, and proof that settlements were never made unless the goods were sold.

The proof produced by the appellant fails to show under which contract, the one of 1894 or 1895, the goods were delivered to the Joliet Strowbridge Company. They were delivered under one or both, and as the burden of proof was on appellant if there was any difference, it must be assumed that the goods were delivered under the one of 1895, which it is conceded was most unfavorable to the appellant.

The first contract, dated October 9, 1894, is in the form of an order from the Joliet Strowbridge Company, directed to appellant, in which goods are ordered to be shipped to it at Joliet, Ill., subject to the conditions as named on the next page of the order, and for which the said consignee agreed "to pay as per price and terms annexed to said goods, for all goods sold." According to conditions the Joliet Strowbridge Company was to pay the freight, and to stand all breakage.

The second contract, of October 12, 1895, provided that the consignee should pay for the goods "as per prices and terms annexed to said goods;" and a memorandum was attached, by which the appellants were to carry "all goods remaining unsold."

It seems to us that the transaction amounted to a sale of the goods to the Joliet Strowbridge Company, or at least it had an option to pay for the goods and retain them.

It was an absolute sale, so far as the appellant was concerned.

There was no agreement on the part of the Joliet Strowbridge Company to return the goods to appellant, or that it should retain any property interest in them, and any

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shortage was not to be allowed to the purchaser, and the goods were held and sold as the consignee saw proper without restriction, and were regarded and treated as the property of the purchaser, and settled for accordingly.

It is in principle the same as a case of "sale or return," leaving it optional with the purchaser and creditor to be extended until sale. We refer to the following cases, as establishing the doctrine that where "the receiver is at liberty to return another thing of equal value or the money value, he becomes a debtor to make the return, and the title to the property is changed—it is a sale." *Loneragan v. Stewart*, 55 Ill. 49; *Richardson v. Olmstead*, 74 Ill. 213; *Chickering v. Bastress*, 130 Ill. 214; *Lenz v. Harrison*, 148 Ill. 598.

We are of the opinion that the decree of the Circuit Court was right, refusing the relief sought by appellants, and it is therefore affirmed.

People, etc., ex rel. Nancy S. Tilden et al. v. John M. Welsh et al., Trustees of Schools.

1. **ELECTIONS—*Women Can Not Vote Upon a Proposition to Establish a Township High School.***—The act of 1891, giving to women the right "to vote at any election held for the purpose of choosing any officer under the general or special school laws of this State," only confers upon women the right to vote for "any officer under the general school laws," and does not authorize them to vote on a proposition to establish a township high school submitted at such an election.

Mandamus.—Appeal from the Circuit Court of La Salle County; the Hon. CHARLES BLANCHARD, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed July 1, 1897.

F. E. HOBERG, HENRY MAYO and JOHN H. WIDMER, attorneys for appellants.

Although the act of 1891 does not, in terms, profess to be an amendment to any other statute, it is manifest that its

necessary effect is to amend the general school law, as revised by the act of 1889, by conferring upon females the privilege of voting at elections provided for in that law. Its obvious purpose and intent was to give to the women of our State an equal voice with the men in deciding such elections. One law may be amended by another without any reference to it. *People v. Wright*, 70 Ill. 388; *Timm v. Harrison*, 109 Ill. 593; *School Directors v. School Directors*, 135 Ill. 464; *English v. City of Danville*, 150 Ill. 92; *Castner v. Walrod*, 83 Ill. 171.

And an amendment of a statute will operate precisely as though the subject-matter of the amendment had been originally incorporated in the statute amended, as regards any action had after the amendment was made. *Holbrook v. Nichol*, 36 Ill. 161; *English v. City of Danville*, 150 Ill. 92.

In construing the act of 1889, as amended by the act of 1891, we think the following rules are applicable:

The primary object of construction is to ascertain and give effect to the legislative intention. *Zaresseller v. People*, 17 Ill. 104; *Soby v. People*, 134 Ill. 66.

A thing within the intention is regarded as within the statute though not within the letter, and a thing within the letter is not within the statute unless within the intention. *Perry County v. Jefferson County*, 94 Ill. 214; *People v. Hoffman*, 97 Ill. 234; *People v. City of Chicago*, 152 Ill. 546.

The court should look at the whole act, and seek to ascertain such intention by an examination and comparison of its various provisions. *Soby v. People*, 134 Ill. 66.

The several provisions should be construed together, in the light of the general objects and purposes of the enactment, so as to give effect to the main intent, although thereby particular provisions are not construed according to their literal meaning. *People v. City of Chicago*, 152 Ill. 546.

Courts, in construing a statute, are not confined to the literal meaning of the words in the statute, but the intention is to be gathered from the necessity or reason of the enact-

ment, and the meaning of the words enlarged or restricted according to their true intent. *Castner v. Walrod*, 83 Ill. 171; *People v. Chicago*, 152 Ill. 546.

That which is implied is as much a part of the statute as that which is expressed; and it is not necessary, in all cases, that the legislature should in explicit and affirmative terms declare its will in order to make that will the law. *People v. Chicago*, 152 Ill. 546; *Wood v. Blanchard*, 19 Ill. 38.

DUNCAN, HASKINS & PANNECK and CHARLES W. HELMIG, attorneys for appellees.

“The presumption is that the legislature does not intend to change or modify the law beyond what it expressly declares, either in express terms or by unmistakable implication; for it is not to be supposed that the legislature will overturn the established principles of law without expressing such intention with irresistible clearness.” Vol. 23, Am. & Eng. Enc. of Law, 357.

MR. JUSTICE DIBELL DELIVERED THE OPINION OF THE COURT.

At the general election for township trustee of schools in township 33 north, and of range 1, east of the third P. M. in La Salle county, a proposition to establish a township high school was also submitted to the voters. Many women possessing the legal qualifications entitling them to vote for school officers voted at said election, and voted not only for school trustee, as by law provided, but also upon the proposition to establish a high school. The school trustees in canvassing the returns, while counting the votes of the women for trustee, rejected their votes upon the question of a high school. They declared the proposition adopted, and correctly so if they were right in rejecting the votes thereon cast by the women; but if the women were legally entitled to vote upon that subject, then the proposition was in fact defeated by their vote. Nancy S. Tilden and other women who voted against said proposition at said election filed in the Circuit Court of La Salle County their petition for a mandamus against said trustees to compel them to

count and record the votes cast by women for and against establishing a township high school, and to make return to the county superintendent of schools of the result adverse to the establishment of such school. The Circuit Court sustained a demurrer to the petition and dismissed it at the cost of the relators. From that judgment the relators prosecute this appeal.

The sole question presented is whether women are entitled to vote upon a proposition for the establishment of a township high school. The Constitution does not authorize women to vote. The only electors therein provided for are men. It is only in cases where the Constitution contains no provision as to the mode in which an election shall be held and as to the qualifications of an elector thereat, that the legislature can confer suffrage upon women. *People ex rel. Ahrens v. English*, 139 Ill. 622; *Plummer v. Yost*, 144 Ill. 68. Their authority to vote in such cases would rest wholly upon legislative enactment. The only authority relied upon here for the counting of the ballots in dispute is the act in force July 1, 1891, entitled, "An act to entitle women to vote at any election held for the purpose of choosing any officer under the general or special school laws of this State." The only vote embraced within the title of the act, as we construe it, is a vote "choosing any officer under the general or special school laws." If the argument that a woman may vote at an election of school officers not only for such officers but also upon everything else submitted to be voted upon at such election, has any support in the title of the act, which we think it has not, that position is excluded by section two of the act. It provides that if there are other public officers to be elected at the same time as school officers, the ballots offered by women entitled to vote under said act shall not contain the name of any person to be voted for at such election except such officers of public schools, and that such ballots cast by women shall be deposited in a separate ballot box, but canvassed with other ballots cast for school officers at such election.

The obvious purpose of the act was to permit women to

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vote for school officers, and caution was used to prevent their voting to fill other offices which might be included upon the ballots cast by men at the same election. It is true the act does not in express terms forbid women voting upon a proposition submitted at said election, but neither does it expressly or by any fair implication permit them to do so. They can not vote upon the proposition unless they can derive their authority from the statute. Under the position here contended for, if the legislature should authorize the election of a school trustee at the general election when officers, from presidential electors down to constables, are upon the ballot, while women could not vote for any other officer named upon the ballot except school trustee, yet they could vote upon any constitutional amendment or proposition to issue bonds or create a debt, which happened to be legally submitted at such general election. We can not believe the legislature, in framing the act under consideration, intended any such result. We are of opinion the sole purpose of the act was to permit women to vote for school officers. It follows that it was the duty of the board of trustees to refuse to count ballots cast by women for and against the establishment of a township high school, and that the judgment of the Circuit Court sustaining the demurrer to the petition for a mandamus, and dismissing the petition, was right, and it is therefore affirmed.

Honora K. Brennan and John S. Cook v. Jeremiah A. Kinsley.

1. APPELLATE COURTS—*Have no Jurisdiction of Constitutional Questions.*—The constitutionality of the act of June 17, 1887, entitled "An act to provide for appeals from interlocutory orders, granting injunctions or appointing receivers," in so far as it purports to allow an appeal from an order overruling a motion to dissolve an injunction is fairly subject to question; and an appeal from such an order should go to the Supreme Court, as this court has no power to pass on the validity of a statute.

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Le Fevere v. Watson.

Injunction.—Motion to dissolve. Appeal from the Circuit Court of Will County; the Hon. DORRANCE DIBELL, Judge, presiding. Heard in this court at the December term, 1896. Appeal dismissed. Opinion filed July 1, 1897.

H. T. & L. HELM, attorneys for appellants.

BENJ. OLIN and MERRILL SPRAGUE, attorneys for appellee.

MR. JUSTICE WRIGHT DELIVERED THE OPINION OF THE COURT.

The appellants appeal to this court from an order of the Circuit Court refusing their motion to dissolve the injunction issued in the case. Appellee has moved this court to dismiss the appeal, and for cause urges that the statute of June 14, 1887, in force July 1, 1887 (3 Starr & Curtiss, 3171), entitled, "An act to provide for appeals from interlocutory orders granting injunctions or appointing receivers," in so far as it purports to allow an appeal from an order overruling a motion to dissolve an injunction, violates Sec. 13, Art. 4 of the Constitution, because the subject of overruling motions to dissolve injunctions is not expressed in the title of the act. We think the question of the validity of the statute in the respect specified fairly arises, and if that is true as we think it clearly follows, the appeal should have been taken directly to the Supreme Court, we being prohibited by the statute from passing upon a question of that nature. The Appellate Court of the First District have decided this question in the same way. *Taylor v. Kirby*, 31 App. 658; *Henkleman v. Peterson*, 40 App. 540; *Chicago v. Beck*, 44 App. 47; *Black Diamond Co. v. Waterloo*, 62 App. 206.

The appeal will therefore be dismissed.

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M. E. Le Fevere v. John Q. Watson et al.

1. **PRACTICE—Bills of Exceptions.**—The action of the court in overruling a motion to quash a writ of certiorari can only be brought to the notice of the Appellate Court by a bill of exceptions. Recitals by the clerk in the record are not sufficient.

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2. APPELLATE COURT PRACTICE—*When no Bill of Exceptions is Filed.*—When alleged errors can not be considered because no bill of exceptions is filed, the proper practice is to affirm the judgment rather than to dismiss the appeal or writ of error.

Transcript, from a justice of the peace. Appeal from the County Court of Peoria County; the Hon. ROBERT H. LOVETT, Judge, presiding. Heard in this court at the December term, 1896. Affirmed. Opinion filed July 9, 1897.

CHARLES A. KIMMEL, attorney for plaintiff in error.

DAN R. SHEEN, attorney for defendants in error.

OPINION PER CURIAM.

Plaintiff in error sued defendants in error before a justice of the peace and recovered judgment. Having failed to appeal, they petitioned the County Court for a writ of certiorari under the statute, which was allowed, and the case brought into that court, where a trial was had by a jury and a verdict rendered for defendants in error, upon which the court rendered judgment against plaintiff in error for the costs of suit. He brings the case to this court on a writ of error, and assigns for error: 1, that the court erred in overruling plaintiff's motion to quash the writ of certiorari and dismiss the appeal, and 2, that the court erred in rendering judgment for the defendants, and that the judgment should have been for the plaintiff.

In order to have preserved these questions for the consideration of this court, the plaintiff in error should have saved them in a bill of exceptions, as otherwise there is nothing in the record for use to pass upon. There is no bill of exceptions in the record. The clerk has improperly inserted in the record what purports to be a motion to quash the writ of certiorari, and also a motion for a new trial, but this action of the clerk does not make these alleged motions a part of the record. In the case of *Hersey v. Schaedel*, 6 Ill. App. 188, it was held that the action of the court in overruling a motion to quash a writ of certiorari can only be brought to the notice of the Appellate Court

by a bill of exceptions, and that recitals by the clerk in the record are not sufficient.

We think the rule is established by numerous decisions in this State, that motions of this character and the action of the court thereon can only be preserved for the consideration of Appellate Courts by bill of exceptions. *Lusk v. Parsons*, 39 Ill. App. 330; *Bernett v. Baird*, 67 Ill. App. 422; *Hughes v. Richter*, 60 Id. 616; *Gould v. Howe*, 127 Ill. 251; *C., R. I. & P. R. R. Co. v. Town of Calumet*, 151 Ill. 515; *Bank of Lawrence Co. v. LeMoyne*, 127 Ill. 253.

Many other cases might be cited to the same effect but we deem it unnecessary. The defendants in error have entered a motion to dismiss the writ of error because the record contains no bill of exceptions upon which the alleged errors can properly be assigned, but we think the proper practice is to affirm the judgment for the reasons above given which will accordingly be done. Judgment affirmed.

CASES
IN THE
APPELLATE COURTS OF ILLINOIS.

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FIRST DISTRICT—MARCH TERM, 1897.

Samuel Franklin v. Iretus R. Krum and J. Fraser.

1. *CONTINUANCES—Amendments as Ground For.*—The court holds that the amendment to the declaration in this case did not materially change the nature of the action; that it was such that defendant could not have been injured thereby, and that it furnished no ground for continuance.

2. *CONTRACTS—Readiness to Perform.*—A contracted to deliver to B a certain quantity of lumber at such time before a specified date, as might suit the convenience of B. After receiving part of the lumber B refused to accept the remainder. *Held*, that it was not essential to a recovery that A should have had all the lumber on hand ready for delivery from the date of the contract to the time of B's refusal to perform on his part, but that it was sufficient if A had and was ready to deliver the lumber whenever B wished for it.

3. *SALES—When Tender of Goods Sold is Unnecessary.*—If the vendee in a contract of sale for future delivery notifies the vendor that he will not receive the goods, the vendor is thereby absolved from any obligation that he might otherwise have been under to make a tender.

Assumpsit, on a contract of sale. Appeal from the Superior Court of Cook County; the Hon. ARTHUR H. CHETLAIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed June 14, 1897.

STATEMENT OF THE CASE.

This record brings for review a judgment for \$1,500, entered against the appellant for damages alleged to have

been sustained by appellant's refusal to accept 900,000 feet of lumber under a written contract made between him and appellees.

Appellant, at the time that the contract in question was entered into, was engaged in the manufacture of moldings and picture frames in Chicago, and was an extensive user of lumber in that business. It appears that only dry lumber could be used in the manufacture of moldings and picture frames, and that winter-sawed lumber was more nearly fit for such purpose than any other.

That there was a refusal to accept lumber from appellees under the contract sued upon, is conceded. There is a difference between the parties as to the cause of the refusal. Appellant insists that he was warranted in refusing to accept the lumber which was being delivered to him by appellees, because of its inferior quality and because it was not within the terms of the contract, the complaint being that it was green and wet, and the sizes, and percentages of sizes, not in accordance with the contract. The appellees insist that there was no cause for appellant's refusal to accept the lumber, and claim that a fall in the market value of the lumber and business depression was the cause of this refusal.

The declaration avers that the appellees were ready and willing at all times after the execution of the contract, between March 3, 1893, and November 1, 1893, to deliver the balance of lumber, and that appellees repeatedly tendered and offered to deliver the balance of the lumber in quantities and at times to suit the convenience of appellant; that appellees suffered loss in the depreciation of the market value of the lumber, and were obliged to resell the balance of the lumber at a large expense.

A plea of general issue was interposed to this amended declaration. On the trial, in the course of taking evidence, appellees asked and obtained leave, over the objection of appellant, to amend this amended declaration. First, by increasing the *ad damnum*. Second, by striking out of the amended declaration the last paragraph: "And were

obliged to sell said balance of 899,500 feet of lumber, at an expense in reselling same of \$500." Upon this latter amendment being permitted appellant moved for a continuance on the ground of surprise, and tendered his affidavit in support of the motion, but the court overruled the motion.

The jury returned a verdict of \$1,500 in favor of the appellees, upon which there was judgment.

PAM & DONNELLY, attorneys for appellant.

SMILEY & CLARK, attorneys for appellees.

MR. JUSTICE WATERMAN DELIVERED THE OPINION OF THE COURT.

The declaration originally read as follows:

"Whereby plaintiffs say they suffered great loss in the depreciation of the market value of said 899,500 feet of said lumber, and were obliged to sell said balance of 899,500 feet of lumber at an expense in reselling same of five hundred dollars, to the damage of the plaintiffs of twenty-five hundred dollars, and, therefore, they bring their suit," etc.

This was amended so as to read:

"Whereby the plaintiffs say they suffered great loss in the depreciation of the market value of said 899,500 feet of said lumber to the damage of the plaintiffs of \$3,500, and, therefore, they bring their suit," etc.

Because of such amendment appellant applied for a continuance and filed an affidavit in support of the same.

The amendment of the declaration did not materially change the nature of the action, nor was it such that appellant could have been injured thereby.

Appellant insists that the court held that it was not necessary for appellees to show that they were ready, able and willing to deliver the lumber in accordance with the terms of the contract. On the contrary, the court instructed the jury as follows:

"The court instructs the jury that before the plaintiffs

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can recover herein they must show that they were ready, able and willing to perform their part of the contract in accordance with the terms thereof, and if you find from the evidence that the plaintiffs were unable to perform the contract, in so far as it was by them to be performed, in accordance with the terms thereof, then the plaintiffs can not recover, and your verdict herein should be for the defendant."

Apparently from the course of the trial, it seems that appellant's contention was that from the making of this contract to the refusal of appellant to carry out the same, it was obligatory upon appellees to have had all the lumber on hand ready for delivery. Such is not the law. It was sufficient for the purposes of the contract if appellees had and were ready to deliver the lumber, whenever appellant wished for it.

Nor did the averment in the plaintiff's declaration, that from the execution of the contract, March 3, 1893, to the first day of November, 1893, they had been ready and willing to deliver all of the lumber, compel appellees to prove that during this period they had in their possession all of such lumber. Nor were appellees, as is insisted, obliged to show that they tendered to appellant the lumber described in the contract.

On the 8th of August, 1893, appellant sent to appellees the following letter:

"CHICAGO, 8—1—93.

Krum, Fraser & Co.

DEAR SIR: We can not understand why, after you received instructions from us to cease shipping, you sent this car of lumber. Business is very poor and the prospects are unfavorable, and we do not want to buy anything that we are not sure that we can pay for. This car was delivered and accepted by us, but we would like the bill dated August 1st. Do not ship us any more lumber until you receive orders to do so, as we will not accept it.

Yours truly,

S. FRANKLIN."

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On the 9th day of the same month, appellant sent the following letter:

“CHICAGO, 8—9—’93.

Krum, Fraser & Co., City.

GENTLEMEN: After tallying the last two cars of lumber, we find that the percentage of first and second does not exceed 35 per cent, while you contracted and agreed that there should be at least 50 per cent, and also that 75 to 80 per cent should be 12 feet. The first and second is almost all 14 feet, which makes it of no more value to us than common. We can not use this at the price, and hold it subject to your order, and also we wish the contract annulled. We will not receive any more lumber on it. You have yourself broken the contract by not delivering enough first and second and the percentage of 12 feet as provided for in the same.

Yours truly,

S. FRANKLIN.”

To which appellees, on the 10th of the same month, replied, saying, among other things: “We are ready to furnish you with the remainder of the quantity as per contract, delivering just what we agreed to in respect to the percentage of first and second clear, and also the 12 foot lengths,” to which appellant on the 23d made the following reply:

“CHICAGO, 8—23—’93.

Krum, Fraser & Co., City.

DEAR SIR: With reference to your recent communication, relative to contract for basswood, we would like to see one of your firm. On thing is certain, we can not, so long as the present condition of business lasts, accept any more lumber, as we have no use for it, having now more stock than we will use all the next month, as we are running with but one-third of our usual force and only, on the average, three days to a week, eight hours per day. Money is exceedingly tight, collections difficult, and we will not contract any bills which we do not see our way to pay when they mature.

Yours truly,

S. FRANKLIN.”

Appellant afterward saw one of the appellees, and told him that he would not receive any more lumber. Certainly this conduct on the part of appellant absolved appellees from any obligation that they might otherwise have been under to make a tender of the lumber.

The action of the court in admitting in rebuttal the testimony of the witnesses Pingle, Manthei and Fraser was within its discretion.

Appellant also complains of the admission in evidence of two of the letters heretofore mentioned. That the letters came from appellant and were dictated by him and forwarded at his instance, was abundantly shown.

We do not think that the verdict is against the weight of the evidence, or that the damages awarded are excessive.

The jury was fully and fairly instructed, in such a manner that appellant has no reason to complain of the action of the court in this regard. At his instance sixteen instructions were given, which fully covered the law applicable to the case.

The judgment of the Superior Court is affirmed.

Susan B. Edson v. The Pennsylvania Company.

1. COMMON CARRIERS—*Liability for Loss of Baggage.*—A common carrier is not exempt from liability for a loss of baggage which takes place because of an act of God, if such carrier has been guilty of any previous negligence or misconduct, which brings the property in contact with the destructive force, or unnecessarily exposes it thereto.

2. SAME—*Liability of, for Loss of Baggage—Showing Necessary Where Loss is Caused by act of God.*—In a suit against a common carrier for the value of lost baggage, an admission that the loss was caused by an act of God relieves the defendant from its liability as an insurer of safe delivery, and in order to again impose upon it the presumption of liability the plaintiff must furnish proof of concurring negligence.

Assumpsit, for the value of baggage. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 26, 1897.

KNIGHT & BROWN, attorneys for appellant.

GEORGE WILLARD, attorney for appellee.

It was stipulated "that the trunk and contents sued for in this case were lost in the Johnstown flood."

Under this stipulation the burden of proving concurring negligence was, of course, on the appellant. *Railroad v. Reeves*, 10 Wall. 176.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This suit was brought by appellant to recover the value of a trunk and contents, lost while in possession of appellee as a common carrier.

Appellant delivered the trunk to appellee on May 30, 1889, at Chicago, for transportation to New York, and it was placed upon appellee's train, which left Chicago on the same day for the point of destination. The train reached the village of Connemaugh at about 10:40 A. M. of the 31st, and was unavoidably prevented from further progress by reason of a wash-out of the tracks to the eastward. It remained at Connemaugh until about 4 o'clock in the afternoon of that day. At about that time an artificial dam on the south fork of the Connemaugh river gave way, and a great volume of water was thereby let into the valley of the Connemaugh, which, rushing down the narrow valley, caused what is known as the Johnstown flood, by which the baggage car containing appellant's trunk was carried away and destroyed. It is uncontroverted that the train could not have proceeded eastward from Connemaugh. The road descended lower into the valley to the westward and a great portion of the disaster caused by the flood occurred west of Connemaugh, at Johnstown. It would seem, however, from the light of after events, that if the train had been moved to some certain spot to the west of Connemaugh (and not too far west) it might have avoided the disaster.

At the conclusion of the evidence for plaintiff, appellant, the trial court directed a verdict for defendant, appellee; and this action of the court is assigned as error.

That the Johnstown flood, by which appellant's trunk

was destroyed, was, in contemplation of law, an act of God, is not disputed. Appellant's contention rests upon the proposition of law that a common carrier is liable for loss of baggage in its possession, when such loss is due not solely to an act of God, but to an act of God combined with the negligence of the carrier; and upon the further proposition that the record here so far shows negligence on the part of appellee in bringing the property of appellant in contact with the flood, as to warrant the submission of the question of such negligence as a ground of liability to the jury.

The proposition first stated is amply sustained by *Wald v. P., C., C. & St. L. R. R. Co.*, 162 Ill. 545.

There is a conflict of authorities in the earlier decisions upon the liability of a common carrier in cases where loss has occurred through act of God, and there has been negligence on the part of the carrier by way of delay in transportation which operated to subject the property to the force causing such loss. But the question is well settled by the decision in *Wald v. P., C., C. & St. L. R. R. Co.*, *supra*, wherein Chief Justice Magruder, in delivering the opinion, and after a thorough review of the authorities, announces the conclusion that "a common carrier is not exempt from liability for a loss which takes place because of an act of God, if such carrier has been guilty of any previous negligence or misconduct, which brings the property in contact with the destructive force of the *actus Dei*, or unnecessarily exposes it thereto."

We have then, to consider whether there is evidence in the record which shows negligence on the part of appellee.

No negligence is claimed by appellant in the management of the train up to the time of its arrival at Connemaugh. It being undisputed that no progress could be made to the eastward, and up out of the valley, it leaves only a question as to any duty, shown by the evidence, to move back toward the west. Appellant offered no evidence upon this point, except the depositions of certain witnesses, which depositions had been taken on behalf of appellee. The only evidence is that elicited by the cross-examination of those witnesses. From their testimony it appears that at the

time in question Connemaugh seemed to the employes of appellee to be the safest available place at which the train could be held. One witness (Diggett) testifies that efforts were made to send messages to Johnstown to warn people there "to look out for the worst."

It is difficult to perceive why reasonably cautious persons should move a train back into the valley toward Johnstown, which was then viewed as a point of great possible danger. The fact that subsequent events showed that had the train been moved a part of the way toward Johnstown it would have escaped, is no criterion by which to measure the duty of appellee's employes. Hare, one of the trainmen, testified: "I knew that the tracks were in bad condition toward Johnstown, but I thought, and think yet, that we were in the safest place in the position occupied by us in the yard."

Counsel for appellant cite the case of *Wald v. P., C., C. & St. L. R. R. Co.*, *supra*, as sustaining their contention that this cause presents such question of negligence as should be submitted to a jury. But there is a clear distinction between the facts appearing in that case and those disclosed by the record here. In the former case, there was a conflict of evidence, and there was some evidence tending to show that the carrier had been guilty of a breach of its implied contract to carry promptly and in due course of business, and that it had been guilty of negligence in permitting an unnecessary delay in transportation, which operated to bring the baggage in the way of the destroying force.

No such question appears here. There is no conflict of evidence in this case.

The admitted fact of the loss of the trunk in the flood excused appellee from its liability as an insurer of safe delivery. In order to again impose upon it the presumption of liability, it devolved upon appellant to furnish proof.

The only question for the trial court to determine was whether any act or omission on the part of appellee appeared from the evidence, upon which negligence could be predicated.

In determination of that question, the court directed the jury to find for the defendant, the appellee here. No other and different verdict could properly have been rendered, or, if rendered, have been permitted to stand.

The judgment is affirmed.

Cornelius C. Chandler v. William H. Smith.

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1. **MEASURE OF DAMAGES**—*Loss Occasioned by Pecuniary Condition of Plaintiff.*—That a plaintiff suing for the wrongful destruction of a barn had no place to take his horses, and could get none, is a matter of which the law will take no notice, as the pecuniary condition of such a plaintiff can not be considered in determining the measure of his damages.

2. **SAME**—*The Rule as to Recovery for Torts Stated.*—A plaintiff suing for a tort can only recover such damages as are the natural and proximate result of the injury complained of.

3. **BURDEN OF PROOF**—*Of a License.*—In a suit for the wrongful destruction of a barn, the defendant pleaded a license. *Held*, that the burden was upon him to establish it, as affirmative defenses must be proved by the defendant.

4. **NEW TRIALS**—*Cumulative Matter Not Sufficient.*—Affidavits in support of a motion for a new trial which are merely cumulative and not conclusive, furnish no sufficient reason for the allowance of the motion.

Trespass, for the destruction of a barn. Appeal from the Circuit Court of Cook County; the Hon. EDWARD F. DUNNE, Judge, presiding. Heard in this court at the March term, 1897. Affirmed if remittitur be entered, otherwise reversed and remanded. Opinion filed August 5, 1897.

BURHANS & HILL, attorneys for appellant.

PARKE E. SIMMONS, attorney for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This is an action by the appellee against the appellant for tearing down a barn occupied by the appellee as a livery, boarding and sale stable. He has recovered \$800, for \$589 of which the brief of his counsel accounts as the loss

on horses which he sold at a sacrifice. True, the brief says the whole damages, for which he undertakes to give items, should have been \$1,022.

Selling his horses at a sacrifice may have been dictated by many other reasons than tearing down the barn. That appellee had no place to take his horses and could get none, is a matter the law takes no notice of. The pecuniary condition of appellee can not be considered in determining the measure of his damages. *Hecht v. Feldman*, 153 Ill. 390; *Palm v. Ohio and Mississippi R. R.*, 18 Ill. 217.

In any event, it can not be said the fact that appellee was compelled to sell his horses was the natural and proximate result of the barn being torn down. This must be so before the loss on sale of horses would be a proper element of damages. 1 *Sutherland on Dams.*, 19 and 21; *Chapman v. Kirby*, 49 Ill. 211.

The other proof as to damages to appellee we think was properly submitted to the jury, and would justify a verdict to the amount of \$433, but no more for loss on business of appellee. *Chapman v. Kirby*, *supra*.

The appellant contends that having pleaded a license, the burden was on the appellee to prove that the appellant had no license; this position is not tenable. Affirmative defenses must be proved by the defendant. *Messmore v. Larson*, 86 Ill. 268.

It may be that if the defense of freehold in *Mrs. Harris*, and entry by her authority, 1 Ch. Pl., 539, Ed. 1883, had been pleaded, it might have been proved, destroying the appellee's whole case. But no such plea was put in.

The affidavits read in support of a new trial were merely cumulative and not conclusive, and therefore furnish no sufficient reason for granting a new trial.

If the appellee will, within ten days after this opinion is filed, remit \$367 from the judgment, we will affirm the residue.

If not, for the error in admitting the evidence of loss on horses, the judgment must be reversed and the cause remanded. In either event the costs are against the appellee.

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70	660
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Harriet D. Howard v. Matilda Tedford.

1. *PRACTICE—Exclusion of Evidence as Error—Showing Necessary.*—The exclusion of evidence can not be held to be error, unless it is shown that injury resulted therefrom, and to show injury by the exclusion of evidence, the facts proposed to be proved must appear.

2. *TRIALS—Reading from the Pleadings in Argument.*—A refusal by the trial court to allow defendant's attorney to read from the affidavit filed with the declaration and comment thereon in closing argument is not error calling for a reversal, where there was no contest as to the amount due.

Assumpsit, on the common counts. Appeal from the Circuit Court of Cook County; the Hon. CHARLES G. NEELY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 26, 1897.

SCHINTZ & IVES, attorneys for appellant.

MOSES, ROSENTHAL & KENNEDY, attorneys for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This was an action to recover an amount alleged to be due appellee for wages.

The evidence presented a case proper for submission to a jury, and in the absence of a prejudicial error, their finding should not be disturbed.

There are two errors assigned:

1st. That the trial court erred in excluding answers to two questions put by counsel for appellant to one Howard, a witness.

That this ruling was erroneous can not be urged here, for counsel neglected to make known by proffer or otherwise, what he would prove by the answers sought. The trial court could not pass upon the relevancy or materiality of the testimony excluded upon the motion for a new trial; nor can this court determine that its exclusion was in any degree prejudicial to appellant.

In *Gaffield v. Scott*, 33 Ill. App. 317, this court has said: "There was no offer made by counsel, and no statement to

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the court of what he expected the witness would answer to such questions. * * * We must know what appellant claims the answers would be, before we can determine that it was error to exclude them. *Jenks v. Knotts*, 58 Ia. 549; *Vatow v. Diehl*, 62 Ia. 676; *Mergenthem v. The State*, 107 Ind. 567; *Stanley v. Smith*, 15 Oregon, 505;" also *Giddings v. McCumber*, 51 Ill. App. 375.

2d. The other error assigned is the refusal of the court to permit counsel for appellant to read from the affidavit, filed with the declaration, and comment upon the same in closing argument.

The authorities cited by counsel sustain their contention that such ruling would in general be error. Yet, if it be error in this case, it is not ground for reversal; for the only legitimate purpose for which the affidavit might have been used in argument, viz., as bearing upon the question of amount due, was precluded by the fact that there was no contest whatever upon the question of amount. Appellant's counsel, in effect, stated to the jury that there would be no contest as to amount, and that the only question submitted would be that of liability.

It does not appear that the affidavit was made by any litigant or witness in the case. The ruling could not have worked harm to appellant. The judgment is affirmed.

Wm. Hough v. Thomas A. Collins.

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1. **MECHANICS' LIENS**—*Contracts Made with a Third Person.*—If the owner of land authorizes a third person to have a building erected thereon, he makes his land liable to the lien of the mechanics for labor and material furnished.

Mechanic's Lien.—Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 26, 1897.

SAMUEL J. HOWE and CHARLES PICKLER, attorneys for appellant.

SULLIVAN & McARDLE, attorneys for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is a proceeding to enforce a mechanic's lien. The petitioner, Collins, filed his claim as an original contractor against Hough as owner. Hough was owner, but had entered into an anomalous contract with a Doctor Dorn and his wife, copartners under the firm name of C. E. Dorn & Co., in relation to the remodeling of the building in question.

Two contracts were signed by Collins, one with C. E. Dorn & Co., wherein they are described as owners, Exhibit "D," and another with Hough, Exhibit "1." One of the questions of fact presented by the record is as to which of these contracts was the one under which Collins performed his work.

Appellant contends that the contract between Hough and C. E. Dorn & Co. was, in effect, a building contract; that C. E. Dorn & Co. were the original contractors; that Collins was a sub-contractor only; that he operated under the contract, Exhibit "D," as a sub-contractor with C. E. Dorn & Co. as original contractors; that the contract between Collins and Hough, Exhibit "1," was never executed by Hough; and that the claim of Collins as an original contractor is without foundation. To this we can not assent.

The contract of Hough and C. E. Dorn & Co. is in substance as follows:

"Agreement, dated January 10, 1894, between William Hough, first party, and C. E. Dorn & Co., second party, witnesses, in consideration of \$1 and mutual promises, that second parties profess to be general contractors, and acknowledge to have examined and fully comprehended the accompanying plans and specifications made by DeWitt Taylor Kennard, as architect, and agree to furnish all material and labor necessary to remodel and complete the interior of (building described in bill) for first party according to said plans and specifications, and deliver same

Hough v. Collins.

completely finished in every respect to the acceptance of said architect by April 15, 1894, or forfeit \$10 for each and every day that may expire between the said time and the time of completion. And in consideration of the full and faithful performance of this contract by second parties, the first party agrees to pay to second parties the actual cost, to wit, a sum equal to the actual cost of the labor and material furnished as above by second party, in installments as the work progresses, on the architect's estimate, holding back fifteen per cent until the final completion and acceptance of the work by said architect, etc. Time shall be of the essence of this contract."

This contract, whatever name be given it is, in effect, simply an arrangement by which Hough attempts, through C. E. Dorn & Co., to accomplish the remodeling of his building, using them to superintend the details and to act as his paymasters in expending his money. It has not the essential characteristics of a genuine builder's contract. C. E. Dorn & Co. do not undertake to remodel at any given price. They are to receive only the cost of the remodeling. In effect they are to supervise the work, and Hough is to pay what the work actually costs. To call Dorn & Co. the managers or superintendents of Hough, would be perfectly consistent with the spirit of the contract; nor does the mere calling them contractors at all change their real relationship. It is true that the contract does contain covenants that Hough is to furnish the money only upon architect's certificates, that a *per diem* penalty shall follow failure to complete within given time, and that certain percentages may be withheld; but the coloring given by such provisions is not conclusive to stamp it as a builder's contract, and the entire absence of any consideration for the undertaking of Dorn & Co. is inconsistent with such conclusion.

It is shown that Dorn & Co. were the agents of Hough for the collection of rents.

Whether this contract be regarded merely as an oddity in the way of an agency contract, or as a subterfuge to avoid liens, matters not. The result is in law the same. Hough

attempted through a third party to make contracts for the remodeling of his building. The cause comes within the reasoning of *Paulsen v. Manske et al.*, 126 Ill. 72, wherein the court say: "It may be difficult to define the exact legal relations existing between these parties, but it is evident that Paulsen was authorized and empowered by the Browns to erect a row of buildings upon the lot, and they were practically to furnish the money. * * * It can make no difference that the contracts for labor and material were signed by Paulsen alone. He was, in fact, acting for and in behalf of the Browns, and they can not be permitted to receive the benefit and escape the liability of the mechanic's lien attaching to their interests."

The test suggested by this decision would seem to be the paying by the owner—whether he pay in a sum, limited by the contract, to the contractor, or in such sums only as become due to laborers and material men, whether the payments be made directly or indirectly. In this case Hough was not protected beyond a limited sum, fixed by a builder's contract, but was to pay all costs of remodeling, of which the claim of appellee is a part.

If as such third party, through whom Hough was attempting to operate, Dorn & Co. were his agents, it matters not at all whether the work was done under the contract with them (Hough being their undisclosed principal) or under the contract with Hough, which Dorn & Co. had power to make for him.

The merit of the case and the law are with the appellee. The decree is affirmed.

Joseph H. Hudlun v. George S. Blakeslee.

1. CORPORATIONS—*Effect of Insolvency of, on Claims of Officers against the Corporation.*—The directors of a solvent corporation, acting in good faith, may deal with it and loan it money, and the subsequent insolvency of the corporation will not affect their right of action to recover their loans.

Hudlun v. Blakeslee.

Creditor's Bill.—Appeal from the Circuit Court of Cook County; the Hon. JOHN GIBBONS, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded with directions. Opinion filed July 26, 1897.

C. STUART BEATTIE, attorney for appellant.

ISRAEL SHRIMSKI and FRANKLIN A. DENISON, attorneys for appellee.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

Appellant has appealed from an interlocutory order of the Circuit Court appointing a receiver on a creditor's bill, based upon a judgment recovered by appellee Blakeslee, against a corporation, May 25, 1897.

The sufficiency of the allegations of the bill to justify the appointment of the receiver are questioned. The bill alleges that a judgment was rendered May 19, 1897, against the same corporation, in favor of appellant, upon two notes, dated, respectively, May 13, 1895, and June 2, 1894; the first payable on demand and the second in six months, which notes were given by one Snowden, who was then secretary and a director of the same corporation, and when the judgment was entered was the president and director; that the notes were delivered by Snowden to appellant without consideration, after their maturity; that at the time the notes were delivered to appellant the corporation was insolvent, to the knowledge of Snowden and appellant; that the transfer was a scheme to prefer Snowden as a creditor of the corporation, and that appellant's judgment is fraudulent and void as to appellant, and a preference of the director, Snowden.

While the bill contains the usual allegations of a creditor's bill, as to issuance of execution, return of sheriff *nulla bona*, and the like, it fails to allege the insolvency of the corporation at the time the notes were given, or at the time when the debt was contracted for which the notes were given, nor does the bill attack the *bona fides* of the notes in any way, except it says their transfer to appellant was with-

out consideration and a scheme to prefer Snowden as a creditor.

It is wholly immaterial that the corporation was insolvent when the notes were transferred. In order that the case of *Beach v. Miller*, 130 Ill. 162, cited by appellee, be in point the bill should allege insolvency of the corporation at the time the notes were given or the debt contracted.

In *Illinois Steel Co. v. O'Donnell*, 156 Ill. 624, the Supreme Court held that the directors of a solvent corporation, acting in good faith, may deal with it and loan it money, and the subsequent insolvency of the corporation will not affect their rights of action to recover their loans.

Therefore it seems clear that the allegations of this bill were insufficient to justify the appointment of the receiver, and the order of the Circuit Court in that regard is reversed and the cause remanded, with directions to the Circuit Court to make such orders as to said receivership as will not be inconsistent with this opinion. Reversed and remanded with directions.

70	666
171	438
70	666
93	1898

North Chicago Street Railroad Company v. Ruth E. Shreve.

1. INSTRUCTIONS—*When Justified by the Evidence.*—In a personal injury suit the jury were instructed that if they found from the evidence that the injury was permanent and incurable they should take that fact into consideration in assessing the damages. No expert evidence was offered on this point, and the testimony was not such that an ordinary person not a medical expert could say, with absolute certainty, that the injury to the plaintiff was permanent or incurable; it tended, however, to show a condition from which it would not be unreasonable for men of ordinary information to infer that the injury was permanent. *Held*, that the evidence was sufficient to justify the instruction.

2. PRACTICE—*Improper Remarks of Counsel Should be Objected to.*—Counsel should not be permitted to allow opposing counsel to make improper remarks to the jury without objection, and first call the attention of the court to them on motion for a new trial.

3. APPEALS AND ERRORS—*Excessive Damages as Ground for Re-*

versal.—Where liability is clearly established an excessive verdict caused by improper remarks of counsel furnishes no ground for a reversal, if the excessive damages are remitted.

Trespass on the Case, for personal injuries. Appeal from the Circuit Court of Cook County; the Hon. ABNER SMITH, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 26, 1897.

EGBERT JAMIESON and JOHN A. ROSE, attorneys for appellant.

"It is the duty of the Circuit Court, in conducting trials by jury, to restrain every effort of the parties to bring before the jury matters which are foreign to the issues to be tried, and especially and scrupulously to exclude all matter when the same has a tendency to excite the prejudice of the jury against the party to the issue." *Hennies v. Vogel*, 87 Ill. 244.

"A court hearing counsel, under pretense of arguing a case, making statements of matter to the jury not in evidence, nor pertinent, as illustrative of matters in evidence, should stop the counsel and explain to the jury the impropriety of his language, and take such measures as shall be appropriate to prevent a repetition of such misconduct, and for failure of duty in that respect manifestly affecting the result, the judgment should be reversed." *Elgin, J. & E. R. R. Co. v. Fletcher*, 128 Ill. 627 To the same effect are *Waldron v. Waldron*, 156 U. S. 361; *Jackson v. The People*, 18 Ill. App. 508; *Pittsburg, C., C. & St. Louis Ry. Co. v. Story*, 63 Ill. App. 239; *Chicago City R. R. Co. v. Barron*, 57 Ill. App. 469; *Yoe v. People*, 49 Ill. 410; *Angelo v. The People*, 96 Ill. 209; *McDonald v. The People*, 126 Ill. 150. *Raggio v. The People*, 135 Ill. 533; *Union Life Ins. Co. v. Cheever*, 36 Ohio State, 201; *Farman v. Lauman*, 73 Ind. 568; *People v. Mitchell*, 62 Cal. 411; *Bullock v. Smith*, 15 Ga. 395; *Jenkins v. N. C. Ore Co.*, 65 N. C. 563; *Brown v. Swineford*, 44 Wis. 291.

"If the trial judge does not interpose, as he properly may, without being called upon during the trial, it should, and doubtless will, always be his duty on a motion for a

new trial, if he believes that any improper element has been worked into the case by unfair and prejudicial appeals to the jury, to award a new trial, if for such prejudicial matter one be asked." *Berry v. State*, 10 Ga. 511; see also *Gould v. Howe*, 127 Ill. 251; *James v. Dexter*, 113 Ill. 654; *Martin v. Foulke*, 114 Ill. 206; *Firemen's Ins. Co. v. Peck*, 126 Ill. 493.

When a verdict is so flagrantly excessive as to be only accounted for on the grounds of prejudice, passion or misconception, a remittitur does not remove the prejudice, passion or misconception. *Lowenthal v. Streng*, 90 Ill. 74.

A defendant ought to have the right to have the verdict of an unprejudiced jury upon his case, and not be compelled to accept in lieu thereof the judgment of the court, and thus be practically denied trial by jury. *Chicago & N. W. R. R. Co. v. Cummings*, 20 Ill. App. 333

MAHER & GILBERT, attorneys for appellee.

We contend that \$5,000 is not an excessive verdict, but even conceding that \$5,000 was a high verdict, still the remittitur entered by the plaintiff would cure an error of this character, if there be one. This court has repeatedly held that a remittitur would cure an excessive verdict. *Stumer v. Pitchman*, 22 Ill. App. 399; *Village of Evanston v. Fitzgerald*, 37 Ill. App. 86; *North Chicago Street Railway v. Lewis*, 35 Ill. App. 477. See also *Clayton v. Brooks*, 31 Ill. App. 62; *Albin v. Kinney*, 96 Ill. 214; *U. R. M. Co. v. Gillem*, 100 Ill. 52; *Thomas v. Fisher*, 71 Ill. 576.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This was an action to recover for damages sustained by reason of an accident alleged to have happened to appellee.

Appellee testified that she took a car of appellant's at the corner of Washington and Dearborn streets, in the city of Chicago; that she had hardly gotten into the car until the conductor came to collect her fare; that the car went one block to the corner of Dearborn and Randolph streets, when she discovered that it was turning west, whereas she

wished to go north; she therefore signaled the conductor to stop, and the conductor nodded his head and whistled; that the car did stop; that she attempted to get off the car, and stepped her right foot onto the foot-board, and that just as she was going to step on the ground, the car moved forward with a quick jerk and threw her off, her right side striking the pavement of Randolph street. The conductor came to her and asked her if she was hurt and helped her to get up. That she then walked to South Water street, and feeling badly went from there to 149 Washington street, where her husband worked.

Her brother and his wife corroborated her as to the happening of and the circumstances attending the accident.

As the consequence of her injury appellee testified that she had a miscarriage, and she also testified, and there was the evidence of a physician which corroborated her, as to her condition subsequent to the injury she received.

The defendant claimed to have no report or knowledge of the accident, and it introduced no testimony as to it. It did, however, introduce evidence of a rule said to have been in force at the time of the accident, to the effect that conductors were not to collect fares until after the cars had crossed Randolph street.

The jury returned a verdict of \$5,000 for the plaintiff. A remittitur of \$3,000 was made, and judgment against the defendant was entered for the sum of \$2,000.

The court, at the instance of appellee, gave the jury the following instruction:

"The court instructs the jury that if you find the issues for the plaintiff in this case, then the plaintiff is entitled to recover such actual damages as the evidence may show she has sustained as the direct or permanent result of such injury, taking into consideration her pain and suffering so far as the same may appear from the evidence in the case; and if the jury find from the evidence that said injury is permanent and incurable, they should take this into consideration in assessing the plaintiff's damages."

While the testimony as to the injury of the plaintiff was

not such that an ordinary juror, that is, a person not a medical expert, could say with absolute certainty that the injury to the plaintiff was permanent or incurable, and there was no testimony of medical experts that such is the case, it was such as tended to show a condition from which it would not be unreasonable that men with ordinary information as to the experiences of women in matters peculiar to their sex, and the duties and trials of wife and motherhood, should infer that her condition, considering the time it had existed, was permanent. We therefore think that while the evidence was not strong, it was sufficient to justify the instruction.

None of the witnesses testifying to the accident were in any way impeached; and while it is singular that the defendant should have had no report of this accident, yet the evidence was such that the jury could not do otherwise than return a verdict for the plaintiff, and we see no reason for thinking that another jury would do otherwise.

It does not appear that the defendant, appellant, has any more knowledge now concerning the accident than it had at the time of the trial of this case in the court below.

We are of the opinion that if the jury was in any way misled by the instruction complained of, still the damages awarded by the jury can not have been increased by this instruction more than to the amount remitted from the verdict.

Objection is made to the conduct of counsel of appellee during the trial. While we do not approve of all that was said or done, we do not think we ought to reverse this judgment for any such reason. No objection appears from the record to have been called to the attention of the court as to the language of counsel, and no ruling obtained from the court. *Marder, Luse & Co. v. Leary*, 137 Ill. 322; *West Chicago St. R. R. Co. v. Annis*, 165 Ill. 475, and cases there cited.

Counsel should not be permitted to allow opposing counsel to make improper arguments to the jury without objection, and first call attention of the court to it on motion for new trial.

Abbott v. Stone.

We see no reason for thinking that another trial would result in a judgment more favorable to defendant than the present. If the verdict of \$5,000 was caused by improper remarks of counsel, the liability, as we think, of appellant being clearly established, and the excessive damages having been remitted, it would be useless to award another trial. We regard it, therefore, as not unjust to appellant or appellee that the judgment of the Circuit Court for \$2,000 should be affirmed.

70 671
172 634

Alice Asbury Abbott v. George W. Stone and Francis B. Sherwood.

1. **USURY—Duplicate Promises.**—A principal note contained a promise to pay interest. Notes for the amount of the interest were also given, this fact being recited in the principal note. *Held*, that the form of the transaction did not render it usurious, only one payment being intended.

2. **EVIDENCE—Of the Payment of Taxes.**—The receipt of a county collector is competent evidence of the payment of taxes.

3. **MORTGAGES—Allowance of Solicitor's Fees Under Trust Deed.**—Attorney's fees may be allowed to the holder of notes secured by a trust deed providing for the payment of attorney's fees to the trustee in case of foreclosure, as it matters not to the grantor whether he pays to the trustee or the holder of the notes.

4. **PROMISSORY NOTES—Indorsements as Evidence of Title.**—Notes offered in evidence by the complainant in a foreclosure suit showed indorsements to a third person which the complainant testified were for collection only. *Held*, that this was sufficient as equity looks to substance and as the indorsements might have been canceled.

5. **EQUITY PRACTICE—As to Orders of Reference.**—A cause was referred to a master in chancery to take proof of the allegations of the bill. The defendant did not ask that the master be ordered to take proof of the averments of the answer, or make any objection to the form of the order, and he and his witnesses testified before the master. *Held*, that the defendant could not complain of the form of the order on appeal.

Foreclosure.—Appeal from the Circuit Court of Cook County; the Hon. OLIVER H. HORTON, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed July 26, 1897.

EDWARD ROBY, attorney for appellant.

If the principal and lawful interest, or the principal alone is to be repaid at all events, no contingency in respect to the excess of interest, or to the entire interest, will be sufficient to remove the contract from the operation of the statute. A stipulation for even a chance of a profit beyond lawful interest is illegal. 27 Am. & E. Ency. of Law, 924; Roberts v. Trenayne, Cro. Jac. 507; Barnard v. Young, 17 Vesey, 44; White v. Wright, 3 B. & C. 273, 10 E. C. L. 76; Cleveland v. Loder, 7 Paige, 557; Browne v. Vredenburg, 43 N. Y. (4 Hand) 195.

In this case the theory of the bill is that Stone as sole creditor filed the bill; and the decree does not acknowledge any trust, but requires sale by a master in chancery—the executive officer of the court.

The mortgage does not provide for any attorney's fee where the creditor forecloses. Fowler v. Eq. Trust Co., 141 U. S. 384, p. 407.

RICHARD B. TWISS, attorney for appellees.

The statutes of Illinois relating to revenue provide for levying taxes on real property in this State, and courts will take notice of a public law. Nimmo v. Jackman, 21 Ill. App. 607.

Notice will be taken of such things, as all persons of ordinary intelligence are presumed to know. Hamilton v. People, 113 Ill. 34; Chi., B. & Q. R. R. v. Warner, 108 Ill. 538.

A court will take judicial notice of the public officers of the county in which it sits, and in some cases their signatures. Walcott v. Gibbs, 97 Ill. 122; Dyer v. Flint 21 Ill. 80; Thompson v. Haskell, 21 Ill. 215; Brackett v. People, 115 Ill. 29.

An indorsement is in the power and control of the payee, and he may strike it out or not as he thinks proper, and the possession of the note by the payee is, unless the contrary appears, evidence that he is the *bona fide* holder of it. Parks v. Brown, 16 Ill. 454, and authorities there cited; Best v. Nokomis National Bank, 76 Ill. 608; Sweet v. Garwood, 88 Ill. 407; Richards v. Darst, 51 Ill. 140.

Abbott v. Stone.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This is an appeal from a decree of foreclosure of a trust deed given to secure a loan of \$20,000. The bill was filed by the trustee and holder of the secured notes.

The principal note given by appellant was as follows:
“\$20,000.00. CHICAGO, ILLS., July 14, 1892.

On August 15th, A. D. 1897, after date, for value received I, Alice, Asbury Abbott, promise to pay to the order of George W. Stone, of Chicago, the principal sum of twenty thousand (20,000) dollars, with interest thereon at the rate of six (6) per cent per annum from August 15, 1892, payable half yearly, to wit: On the fifteenth day of February and of August in each year, until said principal sum is fully paid. Both principal and interest are payable at Northern Trust Co.'s Bank, of Chicago.

The several installments of interest aforesaid, for said period, five years, are further evidenced by ten (10) interest notes, or coupons, of even date herewith.

The payment of this note is secured by trust deed of even date herewith, on real estate in city of Chicago, Cook county, Illinois.

ALICE ASBURY ABBOTT.”

Ten interest notes representing the semi-annual interest for five years were also given by appellant, each of which bear interest at seven per cent per annum after maturity, and she now contends that the transaction was therefore usurious, not that usury has been demanded or was intended but that the form of the notes, principal and coupons, is such as to constitute usury.

We do not so understand the notes.

Four hundred dollars of the loan of \$20,000 was paid to William L. Pierce & Co., and for this appellant gave the following receipt:

“John W. Ulm, 610 Chamber of Commerce Bldg., Chicago.

Received of Geo. W. Stone the sum of four hundred (400) dollars as part of the loan of twenty thousand (20,000) dollars—balance left in escrow with Jno. W. Ulm.

ALICE ASBURY ABBOTT.”

This amount, the evidence shows, was paid to Pierce & Co. for commissions, and was entirely proper.

Appellant objects to the just allowance of \$239.57, paid by appellee, Stone, for taxes upon the incumbered property, and for which appellee produced the receipt of the county collector, which was competent evidence of payment, but if not, a witness testified that he paid the taxes.

A solicitor's fee of \$539.38 was properly allowed under the provision of the trust deed, which appellant states as follows:

"The provision is, that in case the trustee files a bill, and obtains a decree and sells the premises as trustee, or special commissioner, or otherwise, under order of court, he may, out of the proceeds of the sale, pay, first, the costs of suit; all cost of advertising, sale and conveyance, and reasonable fee or compensation as trustee; also (not to exceed) two and a half per cent on the amount of such principal, interest and costs, for attorney's and solicitor's fees, and all other expenses of this trust, including all moneys advanced for insurance, taxes and other liens and assessments, with interest thereon at seven per cent per annum; 'and then' to pay the principal of said notes and interest up to the time of such sale; (third) rendering the overplus, if any, unto the said party of the first part."

As to such provision, see Cheltenham Improvement Co. v. Whitehead, 128 Ill. 279, which is authority for allowing the solicitor's fee in this case.

It is claimed that two of the interest notes offered in evidence appear to have been indorsed by complainant, Stone, to the Northern Trust Co., and that it should have been made a party to the bill. The notes were produced on the hearing by Stone, who testified that the indorsements were for collection only. This was sufficient, as equity looks to substance. The indorsements might have been canceled on the hearing, and that they were not so canceled can make no difference.

The following order of reference was made:

"George W. Stone et al. v. Alice A. Abbott et al. Bill.

On motion of complainants' solicitor, it is ordered that this cause be and is hereby is referred to William Fenimore Cooper, Esq., one of the masters in chancery of this court, to take proof of all the material allegations in the said bill contained, and report the same to this court, with his opinion on the law and the evidence, with all convenient speed."

This order is said by appellant to have been a nullity, because appellant insists that under it proof of the allegations of the answer was not to be taken.

If appellant desired that there should be special directions to take proof of the averments in the answer, she could have asked for it. It is evident that in the order the word "bill" is used as synonomous with cause or pleadings.

Appellant, with her witnesses, appeared and testified before the master.

Afterward the following order was made:

"This cause coming on to be heard upon the objections and motions and exceptions to the denial or overruling of such objections and motions, saved by said defendant, Alice A. Abbott, during the taking of testimony before the master in chancery, according to the provisions of the rule of this court, it is ordered by this court that the master make his report upon the evidence taken, and that all the said motions and exceptions be saved, to be considered by the court upon the hearing of the case, and the report of the master."

The master made a report, to which appellant filed objections, and these being overruled, they were refiled as exceptions, but appellant did not ask for a further reference or for the taking of additional testimony, or for another report.

The testimony and evidence were reported to the court, appellant not asking leave to add anything thereto.

The action of the trustee shows that he accepted the trust, and that the trust deed was and is a valid incumbrance.

The decree of the Circuit Court is affirmed.

70	676
90	128
70	676
e105	*558

Chicago & North Western Railway Co. v. John Joseph Kane.

1. **ORDINARY CARE**—*When a Question for the Jury.*—Whether, under all the circumstances of this case, the plaintiff was exercising, at the time of the injury, the care that an ordinarily prudent man would have exercised, is a question on which reasonable, fair-minded men might fairly arrive at different conclusions, and was properly submitted to the jury.

2. **MASTER AND SERVANT**—*Risks Assumed by the Servant.*—Any number of instances of negligence of a master not amounting to a custom or mode of doing business will not cast upon the servant the risk of subsequent or other similar acts of negligence. To accomplish this result there must be a custom known to the servant, or which by the exercise of ordinary care he should have known.

3. **CONTRIBUTORY NEGLIGENCE**—*Failure to Guard Against a Custom of Defendant to Disobey the Law.*—In an action against a railroad company for personal injuries, in which the negligence charged is a failure to ring a bell as required by a city ordinance, evidence that it was the custom of the company to disregard the ordinance, and that the plaintiff knew it, is admissible on the question of contributory negligence.

4. **DAMAGES**—*Trial Court Should Decide Whether they are Excessive.*—A trial judge is generally in a far better position than an Appellate Court to decide whether the damages awarded by a jury are excessive, and he should never leave this duty to be performed by an appellate tribunal.

5. **SAME**—*\$20,000 Excessive Under the Circumstances of this Case.*—A verdict for \$20,000, damages for the loss of an arm, in favor of a young man twenty years of age, who was earning \$1 per day at the time of the accident, and who afterward secured employment at \$35 per month, is excessive, and should not be allowed to stand.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. JAMES GOGGIN, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed July 26, 1897.

A. W. PULVER, attorney for appellant; E. E. OSBOENE and L. W. BOWERS, of counsel.

CASE & HOGAN, attorneys for appellee; SIMEON P. SHOPE, of counsel.

MR. JUSTICE WINDES DELIVERED THE OPINION OF THE COURT.

This case has been tried twice, the first trial resulting in a judgment for \$10,000, which was reversed, this court holding that the law would not permit a recovery under the evidence in that trial. (50 Ill. App. 100.) The second trial resulted in a judgment for appellee of \$20,000, the trial court holding, however, that the verdict was too large, but stating that it would require a remittitur if it were not for the fact that this court (as heretofore constituted), had taken upon itself the power to make remittiturs from judgments which it believed to be excessive, and therefore declined to interfere with the amount of the verdict.

The declaration under which the first trial was had charged appellant with negligence in kicking a freight car through its switching yard where appellee was at work, without any one being on it to warn appellee of its approach, and also without giving appellee any warning whatever to look out for its approach.

Before the second trial appellee filed two additional counts, the first of which set up two rules of appellant, providing for a man being on the car or ahead of it when pushed ahead or backed by an engine, or in case of a flying switch being made, to see that the way was clear and to give signals, and alleged that appellee was injured by reason of a failure to comply with these rules; the second count set up a city ordinance, requiring the bells of engines to be rung continuously while running in the city, and alleged that appellee was injured by reason of a failure to ring bell so as to warn appellee of the approach of the car which struck him.

The two additional counts merely re-stated more specifically the several charges of negligence in the original declaration.

The proof shows that appellee, at the date of the accident, which occurred about 10 A. M., November 22, 1890, was between nineteen and twenty years of age; had been employed for ten days before the injury by appellant, and was at work in its switch yard, which was over one-half a

mile long and contained more than forty tracks; no streets crossing it; that from three to six engines were constantly employed in switching cars in the yard, and some 600 cars were switched per day; that appellee's duty was to pick up and distribute throughout the yard, where they could be used, the links and pins necessary to couple together cars into trains, and in doing this he was obliged to go all over the yard every day from seven A. M. until dark; that he used a wheelbarrow to carry the links and pins about the yard and distributed them from that; that no bells were rung or whistles sounded by the engines engaged in switching, unless in case of danger; that it was not customary to have a man on top of cars that were kicked or switched alone through the yard, though that was sometimes done; that at the time of the accident appellee was engaged at his work in picking up links and pins about 400 feet east from the west end of track No. 15, where it connected with a lead track, and while so engaged on track 15, with his back to the west, and as he came out from the track where he was at work, a car coming from the west on track 15, and which was not attached to an engine, but had been kicked or pushed in from a lead track and uncoupled from the engine some 300 feet away from this point, ran against him, without his seeing it or hearing any warning of its approach, and caught his right arm between the moving car and another stationary car on the track in front of which he was picking up the links and pins. Appellee did not look for moving cars immediately preceding the accident. The last time he looked west along track 15 it was clear.

His arm was so crushed that amputation of it near the shoulder was performed. No one was on the moving car, and neither the bell or whistle of the engine, which had been attached to the car, and which, at the time of the accident was some three hundred or four hundred feet away, was rung or blown just previous to the time the car was separated from the engine, nor while the car moved through the yard toward the place of the accident, nor was any warning whatever given to appellee. The car that

caused the injury went in on track 15 at the rate of four or five miles an hour, and at the time it struck appellee was moving at about the same rate. This movement of cars is designated by some of the witnesses as a "kicking switch" —by others, a "flying switch," but the weight of evidence is that it is called by railroad men a "kicking switch" or simply "switching."

No serious ill has resulted to appellee from his injury, except the deprivation of his right arm, and from which he no doubt suffered great pain for a time. He left school at twelve years of age, and prior to his injury had worked at paper hanging, for which he received \$1 per day. After his injury he was idle two or two and one-half years, and since has worked as a flagman, receiving \$35 per month.

Appellant's first and second contentions are that appellee did not use ordinary care, and that he assumed the risks of the danger of switching cars in its yard.

It is true, no doubt, that had appellee looked for moving cars a few seconds before he was hurt, he would have escaped injury, but he says that he did look before he went onto the track and saw that it was clear, and being engaged at his work, more time elapsed after he looked than he thought; also it appears that a man was at times placed on moving cars. It was a question of fact whether, under all the surroundings, appellee was exercising the care that an ordinarily prudent and careful man would have done. This is a question on which reasonable, fair-minded men may fairly arrive at different conclusions, and was properly submitted to the jury. *Terre Haute & I. R. R. Co. v. Voelker*, 129 Ill. 541-50; *Chicago & N. W. Ry. Co. v. Dunleavy*, Id. 141; *C., C., C. & St. L. Ry. Co. v. Baddeley*, 150 Ill. 333; *St. Louis, A. & T. H. R. R. Co. v. Eggmann*, 161 Ill. 160; *Lake Shore & M. S. Ry. Co. v. O'Connor*, 115 Ill. 254-62.

That two juries have found that appellee used ordinary care, is not without weight in considering this question.

It is also true that the switch yard was a dangerous place to work, and while it appears that it was not customary to have men on cars when being switched, appellee had only

worked there but a short time, and had seen men on cars which were being switched, and it does not appear that he was aware of a custom in the yard which was in violation of the rules of the company, nor does the evidence show so clearly as to make it a question of law for the court, that by the exercise of ordinary care he should have known. Any number of instances, not amounting to a custom or mode of doing business, of negligence of the master, will not cast upon the servant the risk of subsequent or other similar acts of negligence. There must be a custom known to the servant, or which by ordinary care he should have known. In any event the question as to whether appellee, in the exercise of ordinary care, should have known the custom of moving cars in the yard, under the evidence in this record, should have been submitted to the jury. *Sherman v. Ry. Co.*, 34 Minn. 259; *Bengtson v. Ry. Co.*, 47 Minn. 486; *Abbott v. McCadden*, 81 Wis. 563.

The cases cited by appellant as to assumed risks, are all cases where the servant had actual knowledge of the danger to which he was exposed, or by the exercise of ordinary care, should have had knowledge.

The trial court refused to allow appellant to show, by a cross-examination of two of appellee's witnesses, whether or not it was a custom at and prior to the accident, when switching cars to ring the bell of the engine every time it moved in the yard, and that it was known—the court holding in substance, that a custom can not be shown which violates an ordinance. As before stated, appellee had offered and the court had received in evidence an ordinance of the city of Chicago which required the engine bell to be rung continually while running within the city, and the evidence shows no bell was rung at and prior to the accident.

The ruling of the court was erroneous in this regard. *Bengtson v. Ry. Co.*, 47 Minn. 486; *Abbott v. McCadden*, 81 Wis. 563.

In the *Bengtson* case, the court says: "Conceding that proof that the engine and tender were running at a greater rate of speed than that allowed by the ordinance, was evidence of negligence on the part of the defendant, yet if

running trains in the yard at a greater rate of speed than four miles per hour was the defendant's mode of transacting its business, and that and the risks to which it subjected him were known to deceased while in its employment, he assumed the risks."

In the Abbott case, *supra*, the defense offered to prove that it was the universal custom in the yard, before and at the time of the accident, to run switch engines, in doing the yard work, much faster than six miles per hour (that rate being the limit fixed by ordinance), and that the deceased well knew it. The court said: "While the custom of running switch engines at an illegal or dangerous rate of speed is no defense, it is quite apparent that, if the deceased knew that the engines in the yard constantly were operated at such a rate of speed, and chose without objection to remain in his employment, it was entirely competent to prove the two facts, as bearing on the extent of the risk which the deceased voluntarily assumed."

The fact that appellant was allowed to prove by its witnesses the custom in question, does not avoid the error nor the probable effect of the court's ruling on the jury.

The only remaining matter for consideration is the amount of damages. While this court might be entirely justified, in view of the statements of the trial judge, in holding that the damages awarded are excessive, we prefer to decide that point on the evidence in the record. It seems proper, however, to say that the reason given by the trial judge, stated heretofore, for not requiring a remittitur, is wholly insufficient. The trial judge should never leave his duty to be performed by an appellate tribunal. He is generally in far better position than an Appellate Court to pass upon the question of the amount of damages.

The matters stated above as to the nature of appellee's injuries, his earning capacity, education and station in life, make it fully apparent that \$20,000 is a grossly excessive judgment, which should not have been entered by the trial court.

For the errors above noted the judgment will be reversed and the cause remanded.

**John F. Hopper and John E. Patterson v. Rachael
Davies.**

1. JUDGMENTS.—*Interference With, in Equity.*—There is no such showing of fraud, accident or mistake in this case as warrants a court of equity in assuming jurisdiction to revise a judgment at law.

2. JUDICIAL SALES.—*Inadequacy of Price.*—Inadequacy of price is not sufficient ground for setting aside a judicial sale.

3. RECEIVERS.—*Where Court has no Jurisdiction of the Subject-Matter.*—If, on a bill to set aside a judicial sale, it appear that the court is without jurisdiction to grant the ultimate relief prayed by the bill it has no power to appoint a receiver.

Bill, to set aside a judgment and sheriff's deed. Appeal from the Circuit Court of Cook County; the Hon. ELBRIDGE HANEY, Judge, presiding. Heard in this court at the March term, 1897. Reversed and remanded. Opinion filed August 5, 1897.

MANTON MAVERICK, attorney for appellant Jno. F. Hopper.

GEORGE MARTIN, attorney for appellant Jno. E. Patterson.

GEORGE A. WILLIAMS, attorney for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

This is an appeal from an interlocutory order, appointing a receiver of certain real estate.

The bill of complaint of appellee alleges a judgment recovered against her in favor of J. N. Waller, as administrator, etc., upon certain promissory notes, which notes, the bill alleges, had been paid; execution upon judgment, sale of the real estate in question by sheriff upon execution, sheriff's deed to appellant Patterson, conveyance by Patterson to appellant Hopper, and appropriation of rents by Patterson. No attack is made upon the regularity of the proceedings in which the judgment was rendered. It is, however, alleged that the complainant, appellee, was enabled to properly testify at the hearing of the cause, which resulted in the judgment, because of the serious illness of her

Hopper v. Davies.

husband, and was prevented from appealing from the judgment partly by the death of her husband, and partly by the assurance of her attorney—against whom there is no charge of fraud—that he would obtain a new trial.

The prayer of the bill is, among other things, for the setting aside of the judgment, the sheriff's deed and the deed from Patterson to Hopper.

It is urged that the receiver was appointed without notice to appellant Hopper. We think that upon the facts—the failure to find the address of Hopper from the directory or otherwise, the refusal of Patterson and his counsel to disclose the whereabouts of Hopper, and their subsequent proffer to bring him before the court within twenty-four hours if the court would delay the appointment of a receiver, the court was fully warranted in excusing any further effort to notify Hopper.

It is also urged that the verification of the bill is insufficient, and *Packer v. Roberts*, 44 Ill. App. 232, and other cases are cited in support thereof.

These cases are not in point. In each there was a total failure of proper verification. In the case under consideration the entire bill, save one allegation, was directly and positively verified as matters of fact, and that single allegation, verified upon information and belief, is not a vital one.

But both of these contentions become unimportant from the view which we take of the bill itself and the question of its sufficiency. There are general allegations of fraud in the bill, but the only specific allegation of any kind, attacking the validity of the judgment, which is the basis of the title of appellant Hopper, is that the appellee, the judgment defendant, owed nothing to the plaintiff, who recovered the judgment.

That appellee had adequate remedy at law in this behalf, is only controverted by the allegation that the illness and death of her husband prevented a proper attention to her suit. This is in itself no ground for the intervention of a court of equity. There is no such showing of fraud, acci-

dent or mistake, as would warrant a court of equity in assuming jurisdiction to revise a judgment at law. *Lucas v. Spencer*, 27 Ill. 15.

Nor is the allegation of inadequacy of price paid at the sheriff's sale sufficient. *O'Callaghan v. O'Callaghan*, 91 Ill. 228.

The bill, as presented by the record, whatever its sufficiency for any of the other ends of relief sought, is insufficient for any relief as to the judgment and sale as affecting the title of Hopper to the real estate in question.

"It is clear, if the court was without jurisdiction to grant the ultimate relief prayed by the bill, it had no power to appoint the receiver," etc. *The People v. Weigley*, 155 Ill. 491.

The order is therefore reversed and the cause remanded.

70	684
170	281
70	684
85	515

Benjamin M. Shaffner et al. v. J. S. Appleman et al.

1. **MORTGAGES—Foreclosure of Junior and First Liens.**—A prior mortgage can not be foreclosed under a decree upon an original bill filed by a junior mortgagee. If the holder of the senior mortgage desires a foreclosure in such suit, he must file a cross-bill, and if he does, he may be allowed solicitor's fees if they are provided for in his mortgage.

2. **SAME—Form of Decree of Foreclosure.**—A decree of foreclosure that does not direct the defendants to pay, but only orders that the premises be sold if they do not, is not subject to objection by them.

3. **EQUITY PRACTICE—Expenses of Foreclosure Must Have Been Objected to if Questioned on Appeal.**—Where an item of expense allowed to the complainant in a foreclosure suit by a master in chancery was not objected to before him, nor excepted to before the court, the propriety of its allowance being the subject of evidence, the allowance can not be questioned for the first time on appeal.

Foreclosure.—Appeal from the Superior Court of Cook County; the Hon. JOHN BARTON PAYNE, Judge, presiding. Heard in this court at the March term 1897. Affirmed. Opinion filed July 26, 1897.

B. M. SHAFFNER, attorney for appellants.

LYMAN & JACKSON, attorneys for appellees.

OPINION PER CURIAM.

The appellee named in the title filed a bill to foreclose a

trust deed, in the nature of a mortgage executed to him by the appellants, to secure \$1,000. The bill prayed for a foreclosure, subject to a prior trust deed of the same nature, executed by the appellants to Lyman Baird to secure \$16,000. This last trust deed provided for "a reasonable sum for solicitor's fee in any proceedings to foreclose" it. Baird and the holder of the \$16,000 note came into the suit, and filed a cross-bill to foreclose the deed to Baird.

The master reported, *inter alia*, that \$300 was a reasonable solicitor's fee to them. The appellants objected and excepted to the allowance of that fee, not because it was not reasonable, but because the cross-complainants might have had their relief without a cross-bill, and cite *Soles v. Shepard*, 96 Ill. 131; which was a case, not of a prior, but junior incumbrancer, to whom his share of the surplus proceeds might have been distributed without any pleading on his part.

Here the trust deed of the cross-complainants could not have been foreclosed by a decree upon the original bill. *Rose v. Chandler*, 50 Ill. App. 421.

Whether coming into that suit, and filing a cross-bill was regular practice, we need not inquire; it was no injury, but beneficial, to the appellants that the cross-complainants took that course, instead of filing an original bill, as the costs in the one suit were less than they would have been in two. The allowance of the fee was within the letter and the spirit of the trust deed to Baird.

Another item allowed by the master, and here complained of, was not objected to before him, nor excepted to before the court, and whether it was an expense within the terms of the trust, would be the subject of evidence; the sufficiency of which can not be questioned for the first time on appeal.

The complaint that the decree does not direct the appellants to pay, but only that the premises should be sold if they do not, will probably be rectified if there should be a deficiency. If the decree was wrong in that respect, which it is not, the appellants are not harmed by the error.

The decree is affirmed.

Norton Brothers, a Corporation, v. Stella Sczpurak.

1. **NEGLIGENCE**—*Failure of Master to Keep Machinery in Repair—When Defects Will Create Liability.*—In a suit by a servant against his master for an injury said to be due to the negligence of the master, if it be shown that a machine causing the injury worked defectively and that the master knew it, it is not material what particular flaw or impediment caused the improper working of the machine. Such improper operation is in itself a defect.

2. **QUESTIONS OF FACT**—*Contributory Negligence and Assumption of Hazard by Servant.*—That a plaintiff suing for personal injuries was, when injured, removing a piece of work with her fingers when she might have used a stick for the purpose, and that she had worked for some time upon machines somewhat similar in operation, establish neither contributory negligence or assumed hazard upon her part, conclusively and as matters of law.

3. **INSTRUCTIONS**—*A Proposition of Law Need Only be Stated Once.*—After clearly informing the jury as to the law governing them on a particular question, the court is not obliged to, nor should it reiterate the same proposition of law in other instructions, coupled with different hypotheses of fact which might apply.

Trespass on the Case, for personal injuries. Appeal from the Superior Court of Cook County; the Hon. PHILIP STEIN, Judge, presiding. Heard in this court at the March term, 1897. Affirmed. Opinion filed August 5, 1897.

HERRICK, ALLEN, BOYSEN & MARTIN, attorneys for appellant.

LOUIS SPAHN and MARCUS KAVANAGH, attorneys for appellee.

MR. JUSTICE SEARS DELIVERED THE OPINION OF THE COURT.

Appellee, a young woman employed as a press-hand, brought suit to recover for personal injuries alleged to have resulted from negligence of appellant, her employer, a manufacturing company. A verdict and judgment in her favor resulted.

The appellant was engaged in the manufacture of tin-ware, and used a large number of machines of somewhat

similar construction to the one upon which appellee was injured. The machine or press at which appellee was at work when injured, was a press or stamp for the purpose of stamping into the shape desired various portions of the tinware manufactured by appellant.

The stamp or die is so constructed that in order to operate or come down on the disk and object to be stamped, it has to be put in action by a treadle or lever which, by being pressed, liberates a clutch-pin, which, when so liberated, admits of the descent of the stamp; but until the stamp is so liberated by the removal of the clutch-pin through the pressure on the lever or treadle, this clutch-pin holds, or is supposed to hold, the stamp until it is again permitted to descend by the withdrawal of the clutch-pin. The stamp then makes one punch, and after each action should be again immediately locked by the automatic action of the clutch-pin, which should slip into place and hold the stamp until the next pressure of the lever. Each action of the stamp completes the work to be done by it on each particular piece of tin, and the stamp should remain suspended until the operator adjusts another piece of tin for the impress of the stamp, and applies the lever.

In some of the machines the clutch-pin is released by pressing on a treadle, and in others by pulling on a lever. The one at which appellee was hurt was of the latter description.

The evidence was conflicting. There was evidence that the machine by which appellee was injured operated defectively; that appellant had knowledge of such defective working of the machine, and, with such knowledge, directed appellee to work upon the same, without any notice or warning to her as to its condition.

A fellow-employe of appellee, Mary Murrin, testified: "I worked at it about twenty minutes; then the punch ran up and down; I had touched the lever; it ran up and down twice, when it should have only ran up and down once; I didn't touch the lever twice; I touched it once.

When it did that I told Frank Brown, the foreman, that the press was running up and down.

I saw Stella running down the aisle after she was hurt; this was the same place at which she was hurt; it was between two and three hours after I told the foreman about the condition of that machine, that I saw Stella running down the aisle."

Julia Comley, another employe of appellant, speaking of the defective working of the machine, testified: "Before Stella was hurt, I told Mr. Louis or Mr. Frank Brown. It is a long time since I was out there. I can't remember just when. They were the foremen in that room."

Appellee testified: "The assistant foreman came along and told me to run that other press. Frank Brown was the assistant foreman; he ordered the people around to work. I did not touch the lever; Frank Brown said nothing to me at all about the condition of the machine; nobody told me a word about it."

There was no evidence as to what the particular defect was, which caused the machine to operate improperly. But there was evidence that it did work improperly in this, that the stamp descended at times without the touch upon the lever which should direct its descent, as shown by the testimony of Murrin, who stated that it descended twice when the lever was touched but once.

It is urged by counsel for appellant that in order to recover, it devolved upon appellee to show affirmatively the specific defect which caused the injury, and in support thereof they cite *Sack v. Dolese*, 137 Ill. 129.

There can be no question as to the doctrine invoked as applied to that case. But what of its application to this case?

In the case cited, it will be found that a vital point was lack of any evidence to show that notice of any defect was chargeable upon the master. In the case under consideration, there was no such question. Here, there is direct evidence that the master was informed, through its foreman, that the machine did operate defectively. It is not material here what particular flaw or impediment caused the improper working of the machine. It is enough that

it did so improperly operate, if appellant knew of it. Such improper operation was, in itself, the defect.

It is very strenuously urged by counsel for appellant that the expert evidence showed conclusively that the machine could not have operated as indicated by the evidence for appellee. It is enough to say that the jury from the evidence believed the theory of appellee as to what was, rather than the theory of the experts as to what could not have been. *Chicago, A. P. B. Co. v. Reininger*, 41 Ill. App. 329.

The question of contributory negligence was, under the facts here, a question for the jury.

It was also question for the jury whether the danger, which resulted in injury, was, under the facts of this case an assumed hazard.

That appellee was, when injured, removing a piece of work with her fingers, when she might have used a stick for the purpose, and that she had worked for some time upon machines somewhat, though not precisely, similar in method of operation, establish neither contributory negligence on her part nor assumed hazard, conclusively and as matters of law. *Donahue v. Drown*, 27 N. E. Rep. 675.

The evidence, though conflicting, being sufficient to sustain appellee's declaration and to warrant the jury in finding that appellant knew that the machine was defective in its operation, and that appellant, with such knowledge and without warning to appellee, placed appellee at work upon the same, and that appellee, without fault upon her part, and without having assumed as an ordinary hazard of her employment the danger to which she was thus exposed, was thereby injured, the finding of the jury to such effect should stand unless there be error in the proceeding of the trial. No such error is urged, except the refusal of the court to give the seventh and eighth instructions offered by appellant. Each purports to instruct upon the question of contributory negligence, and the eighth instruction tells the jury that certain stated facts would constitute such negligence.

The doctrine of contributory negligence which the jury were called upon to apply to the facts of this case, was sufficiently explained to them by the first and second instructions given for appellant.

After clearly informing the jury as to the law governing them in this regard, the court was not obliged to, nor should it, reiterate the proposition of law, in other instructions coupled with different hypotheses of fact which might apply.

The judgment is affirmed.

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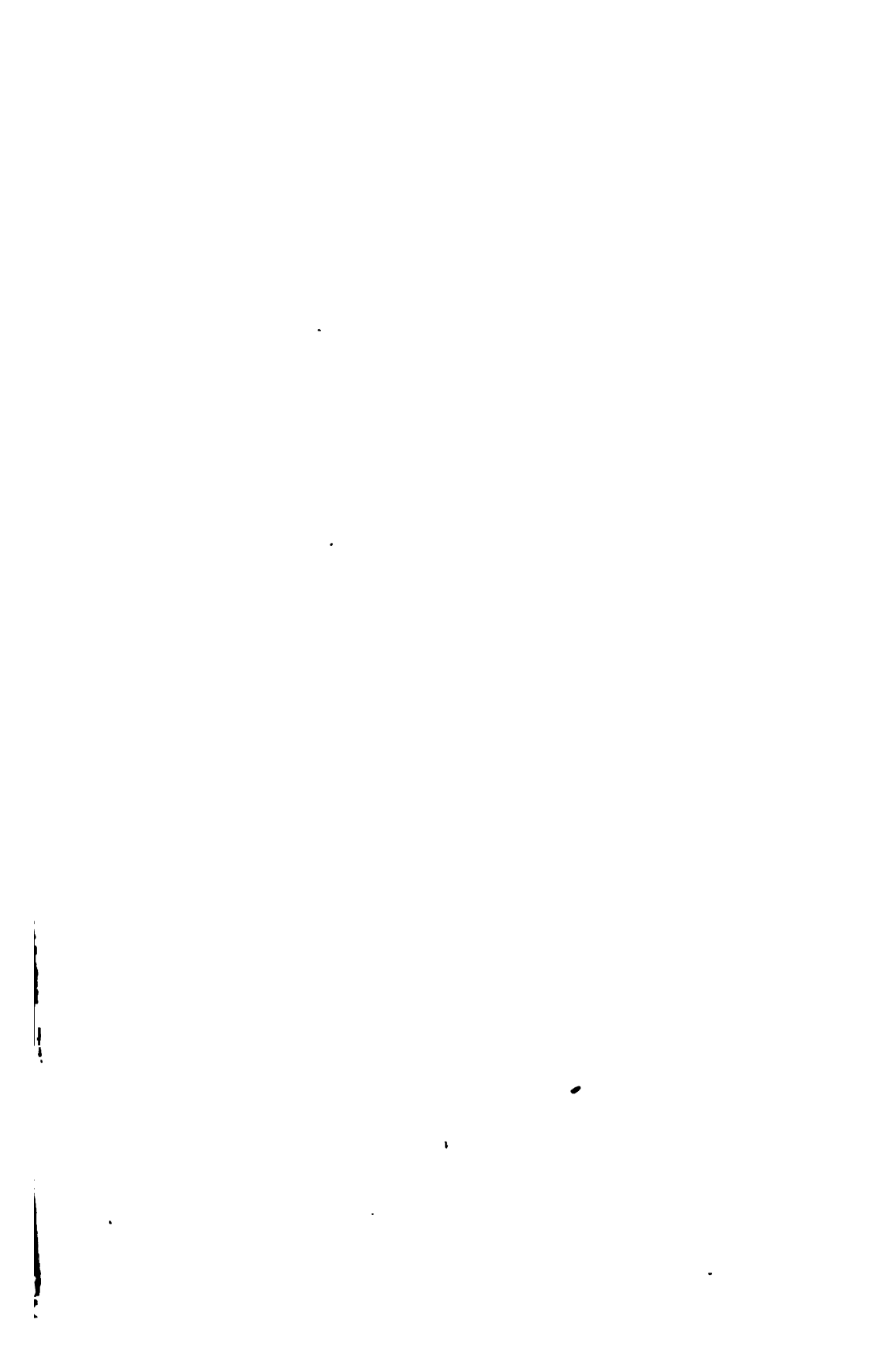
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